

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

**RUTH SCHAEFFER, EVELYN MINTY
and DIANE PINDER**

Applicants

and

**POLICE CONSTABLE CHRIS WOODS, ACTING SERGEANT MARK PULLBROOK,
POLICE CONSTABLE GRAHAM SEGUIN, JULIAN FANTINO, COMMISSIONER OF
THE PROVINCIAL POLICE, IAN SCOTT, DIRECTOR OF THE SPECIAL
INVESTIGATIONS UNIT and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
(MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES)**

Respondents

**FACTUM of the Respondent Ian Scott,
Director of the Special Investigations Unit**

ATTORNEY GENERAL FOR ONTARIO
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Robin K. Basu (LSUC # 32742K)
Tel: (416) 326-4476
Arif Virani (LSUC # 44463H)
Tel: (416) 326-0131
Fax: (416) 326-4015

Dennis W. Brown Q.C. (LSUC #104680)
Tel: (416) 326-4156
James Kendik (LSUC # 44589H)
Tel: (416) 326-4102
Fax: (416) 326-4181

Counsel for the Respondent,
Ian Scott, Director of the SIU

TO: FALCONER CHARNEY LLP

8 Prince Arthur Avenue
Toronto, Ontario M5R 1A9

Julian N. Falconer
Tel: (416) 964-3408
Fax: (416) 929-8179

Counsel for the Applicants,
Ruth Schaeffer, Evelyn Minty and Diane Pinder

AND TO: PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Suite 501, 250 University Avenue
Toronto, Ontario M5H 3E5

Ian Roland
Michael Fenrick
Tel: (416) 646-4300
Fax: (416) 646-4301

Counsel for the Respondents,
Chris Wood, Mark Pullbrook and Graham Seguin

AND TO: MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES

Legal Services Branch
8th Floor, 77 Grenville Street
Toronto, Ontario M5S 1B3

Chris Diana
Tel: (416) 314-3513
Fax: (416) 314-3518

Counsel for the Respondent,
Julian Fantino, Commissioner of the Provincial Police

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**FACTUM of the Respondent Ian Scott,
Director of the Special Investigations Unit**

PART I - OVERVIEW

1. This factum is submitted by the Respondent Ian Scott, Director of the Special Investigations Unit, a unit of the Ministry of the Attorney General of Ontario. It addresses issues that have been raised on the merits of the Application in the event the motion to strike the Application fails. This Respondent takes no position on the motion to strike.

2. The Application seeks declaratory relief in respect of provisions of the *Police Services Act*, R.S.O. 1990, c.P.15 (the “Act”) and Ontario Regulation 673/98 thereto (the “Regulation”), that govern the police duty to co-operate with investigations by the Special Investigations Unit (“SIU”) into serious injuries and deaths that may have been committed by police officers.

3. This Respondent takes the following positions on issues raised on the merits of the Application:

- I. A police officer's legislated right to consult legal counsel (or a police association representative) in an SIU investigation does not permit counsel (or the representative) to assist the officer during the note-taking process. Officers have a professional duty to make independent and contemporaneous notes of an incident for the administration of criminal justice and other purposes. The fulfilment of this duty can be seriously undermined by a practice of counsel (or a representative) vetting, shaping, revising and/or suggesting the content of officer notes prior to their delivery to the officer's chief of police and/or the SIU. An officer does not have a constitutional right to consult counsel, or to secure counsel's assistance, while preparing the notes he or she is required to make in accordance with his or her duties as a police officer.
- II. A claim of solicitor-client privilege over an officer's "first draft" of his or her notes of an incident is incompatible with the officer's professional duty to make independent and contemporaneous notes.
- III. A police officer's right to consult counsel does not include a right to share the same lawyer (or lawyers from the same law firm) as other officers. Jointly retained lawyers (and firms) are obliged to share confidential information among their clients: withholding from a client information obtained from another client on the same matter would constitute a breach of professional ethics and of the lawyer's (and firm's) fiduciary duty to the client. A joint retainer of the same lawyer by officers who were involved in an incident being investigated by the SIU can thus undermine the regulatory requirement that officers be segregated from each other and not communicate with each other about an incident until after the SIU has completed its interviews.
- IV. The practice of police forces de-briefing civilian witnesses is inconsistent with the principal investigative role assigned to the SIU by the *Act* and the Regulation. The SIU has express priority over any police force in investigating the circumstances of injury or death.

V. Delay in notifying the SIU of serious injuries or deaths that may have resulted from police action conflicts with the regulatory requirement of immediate SIU notification of an incident which might reasonably engage its mandate. A practice of informing police associations and the media prior to the SIU is incompatible with the regulatory requirement to provide immediate notice to the SIU. Timely notification of the SIU is important in ensuring the integrity of investigations and the preservation of evidence.

4. This Respondent notes that in considering the issues in this Application the Court should bear in mind that if an officer is designated the subject of an SIU investigation (i.e. if he or she faces potential penal liability) the officer's notes of the incident cannot be used (or used derivatively) against him or her in a subsequent penal proceeding, if any. This immunity is provided for in the Regulation, and by application of the *Charter*.

PART II - FACTS

Schaeffer Investigation

5. On June 24, 2009 the SIU was notified of a shooting incident involving the OPP in the remote area of Osnaburgh Lake in Northern Ontario. The shooting occurred at 12 p.m. Levi John Schaeffer ("Schaeffer") died in the shooting. The SIU was informed of the incident at 3 p.m. by Inspector Peter Loree.

Report of Ian Scott, Director of SIU, to the Attorney General, dated September 25, 2009 ["Schaeffer SIU Report"], Applicants' Application Record ["AR"], Tab 4[C] at 63

6. The SIU immediately dispatched three investigators and two SIU forensic investigators, and commenced its investigation pursuant to its statutory mandate.

Schaeffer SIU Report, *supra* at 63

7. Ultimately, after reviewing the evidence collected by the investigators, the SIU Director (this Respondent) concluded that there were no "reasonable grounds that the subject officer, Cst.

Wood, committed a criminal offence in the firearms death of Mr. Schaeffer.”

Schaeffer SIU Report, *supra* at 93

8. However, the Director noted in his report to the Attorney General that there were several issues respecting the OPP officers’ notes in response to the shooting incident which affected the integrity of the SIU investigation, including, *inter alia*:

- (a) officers were instructed by their police supervisor not to draft any notes until they spoke with counsel;
- (b) counsel instructed the officers to provide him with a copy of their notes prior to the notes being given to the SIU;
- (c) counsel advised officers about the substantive quality of their notes;
- (d) access to officers’ first drafts of their notes was denied on the basis of privilege; and
- (e) the same counsel represented all of the officers involved.

Schaeffer SIU Report, *supra* at 78, 83, 86, 88, 92-94

9. In his Report to the Attorney General, the Director of the SIU expressed serious concern respecting these practices:

This note writing process flies in the face of the two main indicators of reliability of notes: independence and contemporaneity. The notes do not represent an independent recitation of the material events. The first drafts have been “approved’ by an OPPA lawyer who represented all of the involved officers in this matter, a lawyer who has a professional obligation to share information about his clients when jointly retained by them. Nor are the notes the most contemporaneous ones--they were not written as soon as practicable and the first drafts remain in the custody of their lawyer. I am denied the opportunity to compare the first draft with the final entries. Accordingly, the only version of the material events are association lawyer approved notes. Due to their lack of independence and contemporaneity, I cannot rely on these notes nor A/Sgt Pullbrook’s (witness officer) interview based upon them for the truth of their contents.

I have a statutory responsibility to conduct independent investigations and decide whether a police officer probably committed a criminal offence. In this most serious case, I have no informational base I can rely upon. Because I cannot conclude what probably happened, I cannot form reasonable grounds that the subject officer in this matter committed a criminal offence.

Schaeffer SIU Report, *supra* at 94

Minty Investigation

10. On June 22, 2009, the SIU was notified of a shooting involving the OPP in Elmvale, Ontario. The shooting occurred at 8:17 p.m. Douglas Minty (“Minty”) died in the shooting. The SIU was informed of the incident at 9:49 p.m. by Inspector Charles Cox.

Report of Ian Scott, Director of SIU to the Attorney General, dated October 14, 2009) [“Minty SIU Report”], Applicants’ AR, Tab 5[B] at 212, 236

11. The SIU immediately dispatched four investigators and three SIU forensic investigators, and commenced its investigation pursuant to its statutory mandate. The investigators arrived at the scene at 11:00 p.m.

Minty SIU Report, *supra* at 212

12. Ultimately, after reviewing the evidence collected by the investigators, the SIU Director (this Respondent) concluded that there were “no reasonable grounds to believe that the named subject officer, Cst. Seguin, committed a criminal offence in relation to the firearms death of the decedent, Mr. Minty.”

Minty SIU Report, *supra* at 236-37

13. However, the Director noted in his Report to the Attorney General numerous issues that compromised the integrity of the SIU investigation, including, *inter alia*:

- (a) OPP officers were instructed by their supervisor not to write up their notes until they spoke with their counsel;
- (b) Delayed notification of the incident to the SIU (1.5 hours after the incident, and after notification had already been provided to both the OPPA and an OPP media representative), notwithstanding the requirement for “immediate” notification in s. 3 of the Regulation; and
- (c) OPP officers had taken statements from two material civilian witnesses, notwithstanding s. 5 of the Regulation that designates the SIU as the lead investigator.

Minty SIU Report, *supra* at 229-31, 236-38

O. Reg. 673/98 at ss. 3, 5

PART III - LAW

14. This Application raises the following issues:

- I. Does a subject or witness officer have a right to engage the assistance of counsel in the note-taking process? More particularly, is there a right to submit officer notes of an incident to counsel (or association representative) for review, vetting or revision prior to submission of the notes to the officer's chief of police and/or the SIU?
- II. Is an assertion of solicitor-client privilege over a "draft" of officer notes compatible with the officer's professional duty to prepare independent and contemporaneous notes of an incident?
- III. Does a subject or witness officer have the right to retain the same lawyer or law firm as other subject or witness officers involved in an incident being investigated by the SIU? Is such a right consistent with the Regulation which provides that officers should be segregated from each other and shall not communicate with each other prior to the completion of SIU interviews?
- IV. Are police forces permitted under the legislation to de-brief civilian witnesses prior to the SIU?
- V. Is notification of the police association and/or the media prior to notification of the SIU consistent with the requirement for immediate notification in the Regulation?

15. This Respondent's position is that these questions should be answered in the negative.

The Statutory Scheme

16. The SIU is an arms-length investigative unit of the Ministry of the Attorney General,¹ established under s. 113 of the *Act*, with the mandate under s. 113(5) to investigate "the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers." The decision as to whether to conduct an investigation is discretionary.

Police Services Act, R.S.O. 1990, c.P.15, at s. 42(e)

¹Section 113 of the *Police Services Act* refers to the SIU as being a unit of the Ministry of the Solicitor General. By Order-in-Council 814/93 responsibility for the SIU was transferred to the Ministry of the Attorney General.

17. Under s. 113(7), if an investigation discloses reasonable grounds to believe an offence has been committed, an investigation shall result in informations being laid by the SIU against police officers in connection with the matters investigated, and a referral to the Crown Attorney for prosecution.

18. The results of SIU investigations are reported directly to the Attorney General (s. 113(8)).

19. Co-operation in the conduct of SIU investigations is mandatory for members of police forces (s. 113(9)).

20. Oversight by the SIU is intended to be independent. Current or former police officers may not serve as the Director of the SIU; current police officers may not serve as investigators with the SIU (s. 113(3)). Investigators are prohibited from participating in an investigation of members of a police force with whom they formerly served (s. 113(6)).

21. The Regulation, entitled “Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit”, prescribes the procedures to be followed in respect of investigations within the SIU’s mandate and regulates the conduct and duties of officers involved in the incident under investigation. It provides, *inter alia*, as follows [pertinent provisions italicized and quoted *verbatim*, with key words underlined].

O. Reg. 673/98, at s. 10(3)(c)

- (a) Section 3: Immediate notification of the SIU of an incident that may be within its mandate is required:

3. A chief of police shall notify the SIU immediately of an incident involving one or more of his or her police officers that may reasonably be considered to fall within the investigative mandate of the SIU, as set out in subsection 113 (5) of the Act.

- (b) Section 4: Pending the SIU’s arrival, the chief of police is required to ensure that the scene of the incident is secured in accordance with standard police practice/policy.

- (c) Section 5: The SIU has investigative priority over all other forces.

5. The SIU shall be the lead investigator, and shall have priority over any police force, in the investigation of the incident.

- (d) Section 1(1): Officers involved in an incident that is under SIU investigation are classified into two categories, subject and witness, reflecting the difference between those involved officers who may ultimately face exposure to penal liability in connection with the incident, and those officers who do not face such exposure. The two categories are defined as follows:

'subject officer' means a police officer whose conduct appears, in the opinion of the SIU director, to have caused the death or serious injury under investigation;

'witness officer' means a police officer who, in the opinion of the SIU director, is involved in the incident under investigation but is not a subject officer.

- (e) Section 6.(1): All involved officers are to be segregated from each other, as far as practicable.

6. (1) The chief of police shall, to the extent that it is practicable, segregate all the police officers involved in the incident from each other until after the SIU has completed its interviews.

- (f) Section 6(2): Involved officers are not to communicate with each other about the incident.

6. (2) A police officer involved in the incident shall not communicate with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews.

- (g) Section 7: Every officer [subject and witness] has the right to consult counsel or their association representative, provided such consultation will not cause unreasonable delay.

7. (1) Subject to subsection (2), every police officer is entitled to consult with legal counsel or a representative of the association and to have legal counsel or a representative of the association present during his or her interview with the SIU.

(2) Subsection (1) does not apply if, in the opinion of the SIU director, waiting for legal counsel or a representative of the association would cause an unreasonable delay in the investigation.

- (h) Section 8: A witness officer is required to meet with the SIU for an interview “to answer all of its questions” immediately upon being requested,¹ or within 24 hours if there are appropriate grounds for delay.² The interview is recorded by the SIU and a copy of the transcript/notes is to be provided to the officer; the interview may be audio- or video-taped with the consent of the officer.
- (i) Sections 9(1) and (2): A witness officer is required to complete in full the notes on the incident as required by his or her duty as a police officer. The notes are to be provided to the officer’s chief of police, and passed by the chief to the SIU, within 24 hours³ after a request for the notes is made by the SIU.

9. (1) A witness officer shall complete in full the notes on the incident in accordance with his or her duty and, subject to subsection (4) and section 10, shall provide the notes to the chief of police within 24 hours after a request for the notes is made by the SIU.

(2) Subject to subsection (4) and section 10, the chief of police shall provide copies of a witness officer’s notes to the SIU upon request, and no later than 24 hours after the request.

- (j) Section 9(3): A subject officer is required to complete in full the notes on the incident as required by his or her duty as a police officer, but these are not to be provided to the SIU.

9. (3) A subject officer shall complete in full the notes on the incident in accordance with his or her duty, but no member of the police force shall provide copies of the notes at the request of the SIU.

- (k) Sections 10(1) and (2): Prior to requesting an interview with a witness officer under s. 8, and prior to requesting a witness officer’s notes under ss. 9(1) and (2), the SIU is to advise the chief of police and the officer in writing whether the officer has been designated a subject or witness officer. If this designation changes at any time, the SIU must inform the chief of police and the affected officers of the change, in writing.

- (l) Sections 10(3) and (4): If the SIU director decides that a witness officer who has been interviewed or has had his notes submitted to the SIU is now a subject officer, the SIU must (a) return to the officer the original and all copies of the record of the interview and (b) return to the officer’s chief of police the officer’s notes on the incident. The chief of police shall retain the officer’s notes for the purposes of his or her own administrative/disciplinary investigation of the incident in accordance with s. 11.

¹ A request must be made in person: s. 8(2).

² The SIU director may request that an interview take place beyond the 24 hour time requirement: s. 8(5).

³ The 24 hour period may be extended by the director of the SIU: s. 9(4).

10. (3) If, after interviewing a police officer who was considered to be a witness officer when the interview was requested or after obtaining a copy of the notes of a police officer who was considered to be a witness officer when the notes were requested, the SIU director decides that the police officer is a subject officer, the SIU shall,

(a) *advise the chief of police and the officer in writing that the officer is now considered to be a subject officer;*

(b) *give the police officer the original and all copies of the record of the interview; and*

(c) *give the chief of police the original and all copies of the police officer's notes.*

10. (4) The chief of police shall keep the original and all copies of the police officer's notes returned under clause (3)(c) for use in his or her investigation under section 11.

- (m) Section 11: Subject to the SIU's lead investigative role, the chief of police is also required to investigate the incident "*forthwith*" in order "*to review the policies of or services provided by the police force and the conduct of its police officers.*" Members of the force are obliged to co-operate fully with the chief's investigation.
- (n) Section 12: During the course of an SIU investigation, the police force and its members "*shall not disclose to any person any information with respect to the incident or the investigation*", except as permitted in the Regulation.
- (o) Section 14: the SIU may relieve a chief of police or an officer of compliance with the Regulation if compliance is not possible for reasons beyond the chief or officer's control.

Issue I: Does a subject or witness officer have a right to engage the assistance of counsel in the note-taking process? More particularly, is there a right to submit officer notes of an incident to counsel (or association representative) for review, vetting or revision prior to submission of the notes to the officer's chief of police and/or the SIU?

22. This Respondent submits that a police officer's right to consult legal counsel (or an association representative) in an SIU investigation, as provided by s. 7 of the Regulation, does not permit the officer to have his or her counsel (or representative) assist the officer in the note-taking process. Officers have a professional duty to make independent and contemporaneous notes of an incident for the administration of criminal justice and other purposes. The fulfilment of this duty can be seriously undermined by a practice of counsel (or a representative) vetting,

shaping, revising and/or suggesting the content of officer notes prior to their delivery to the officer's chief of police and the SIU in accordance with s. 9 of the Regulation. Moreover, an officer does not have a constitutional right to consult counsel, or to secure counsel's assistance, while preparing the notes he or she is required to make in accordance with his or her duties as a police officer.

O. Reg. 673/98, at ss. 7, 9

The Professional Duty to take Independent and Contemporaneous Notes

23. At the outset, this Respondent's submission canvasses the nature and salient features of an officer's duty to take notes.

Nature of the duty

24. The duty to take notes of the events that occur during an officer's tour of duty is a pre-existing obligation of the officer that arises by virtue of the officer's profession. This duty arises independently of whether the SIU or other entity is investigating an incident involving an officer or his or her colleagues, and independently of the Regulation governing officer conduct in SIU investigations.

25. This is apparent in ss. 9(1), (2) and (3) of the Regulation (quoted above at paras. 21(i) and (j)), which refer to "*the notes on the incident*" that a witness or subject officer is required to prepare "*in accordance with his or her duty*". The Regulation provides that it is those notes, prepared in accordance with the officer's duty as a police officer, that must, in the case of a witness officer, be provided to the chief of police and then to the SIU (ss. 9(1) and (2)), and in the case of a subject officer, be provided to the chief of police (s. 9(3)).

26. The independent nature of the duty to make notes was noted by the Court of Appeal in *Kerr*, in the context of admitting into evidence police notebooks in a disciplinary matter involving members of the Toronto police:

... Officers of the Metropolitan Toronto Police Force are required to make notes of events occurring while on duty. The essential purpose of requiring the officers to make notes is not to accumulate information that can later be used against them. Rather, the notes are made in the course of the officers' investigation of the wrongdoing of others ...

... Police officers are required to make notes of their dealings with others, and persons who become police officers are aware of the obligation to keep notes when making their decision to join the profession ...

... The officers' notebooks were compiled as part of their undertaking to serve the public and they would exist quite apart from any investigation into their alleged wrongdoing.

***Ontario (Police Complaints Commissioner) v. Toronto (Metropolitan) Police Force (Kerr Complaint)*, (1997) 143 D.L.R. (4TH) 471 at paras. 11-13 (C.A.) [“Kerr”], Respondents’ Book of Authorities [“BOA”], Tab 9**

27. Similarly, in *Schertzer*, the Superior Court considered and rejected the applicability of the *Charter* protection against self-incrimination to officer’s notes tendered for use in criminal proceedings against the officer.⁴ In reaching this conclusion, Nordheimer J. noted that the duty to create notes is fundamental to the professional role of the police officer – a role that is undertaken by an individual voluntarily and with knowledge of the obligations entailed. This note-taking duty is triggered independently of any investigation into potential misconduct of the officer:

...the obligation to make notes arises from the individual's employment as a police officer. At the risk of stating the obvious, no one is compelled to become a police officer. Persons make a free decision to become police officers and they do so with full knowledge of what that decision entails. Persons deciding to become police officers surely know that their actions as police officers will be subject to scrutiny in a variety of ways including by their superiors, by their fellow officers, by the public, by the media and by the courts. The training that individuals go through in order to become police officers fully informs those persons regarding their duties and obligations as such.

...

The notes ... assist in the proper prosecution of criminal and other offences because they are intended to provide a reliable and timely record of the events underlying those offences.

...

It remains the fact that the principal purpose of requiring notes to be made is not for the purpose of investigating the actions of police officers. It is an incidental effect of the requirement to make notes that possible misconduct by an officer may be revealed.

***R. v. Schertzer*, (2007) 161 C.R.R. (2d) 367 at paras. 14, 16, 21 (Ont. S.C.J.); rev’d on other grounds (2009) 248 C.C.C. (3d) 270 (C.A.), Respondents’ BOA, Tab 27**

⁴ Note that in the SIU context a subject officer’s notes cannot be used against him or her in the SIU investigation or any penal proceedings that arise therefrom. See Regulation, s.10, and the discussion herein, *infra*, at para. 75.

28. Police officer notes are no different in this respect than the clinical notes that a physician is required to make in connection with his or her treatment of a patient in accordance with his or her professional duty. The fact that the clinical notes may be related to a matter in which the doctor or his or her colleagues were involved in potential misconduct does not alter the doctor's duty to record the clinical notes accurately and fully as required by the standards of practice of the medical profession.

29. The fundamental duty of independent and contemporaneous note-taking is reinforced for officer trainees at the Provincial Police Academy and the Ontario Police College. This curriculum specifies that “[n]otes must contain your independent recollections providing an accurate and complete account of police observations and activities.” Trainee constables are instructed, from the outset, that timeliness is vital: “entries are to be made during or as close to the investigation as possible...”

Ontario Police College, *Basic Constable Training Program (Student Workbook—Evidence) 2008*, Respondent's [SIU] Application Record, Tab 1 at 5, 11

30. Proper note-taking is essential to an officer's exercise of his or her duty to lay charges and participate in prosecutions, as set out in s. 42(e) of the *Act*. When an officer joins the police force, he or she becomes subject to the force's orders and directions. The OPP Orders confirm officers' professional obligation to take “concise, comprehensive particulars of each occurrence” during an officer's tour of duty.

Hon. Roger Salhany, Q.C., *Report of the Taman Inquiry (Library and Archives Canada, 2008)* at 133, Respondents' BOA, Tab 38 [“*Taman Inquiry*”]

***R. v. Schertzer*, supra at para. 14**

***Police Services Act*, supra at s. 42(e)**

Ontario Provincial Police Orders [“OPP Orders”], June 2009 Revision at s. 2.50.3, Applicants' Supplementary Application Record [“Supp. AR”], Tab 4 at 36-38; OPP Orders, March 10 Revision at s. 2.50.3, Supp. AR, Tab 5 at 54-56

31. As the note-taking duty arises as a result of officer's employment as a police officer, an officer is free to terminate his professional employment if he or she does not wish to continue to be bound by the duty.

***R. v. Fitzpatrick*, [1995] 4 S.C.R. 154 at para. 41, Respondents' BOA, Tab 20**

***R. v. Schertzer*, *supra* at para. 14**

Features of the duty

32. The instruction and direction provided to police officers relate not simply to the duty to make notes, but also the manner of note-taking. Accuracy, comprehensiveness, timeliness and independence are the hallmarks of proper note-taking.

33. The Honourable Roger Salhany, Q.C. (formerly a Justice of this Honourable Court and one of Canada's leading jurists in criminal law and procedure) served as Commissioner of Manitoba's Taman Inquiry into the investigation and prosecution of an off-duty police officer for a fatal impaired driving accident. In his Inquiry Report, Commissioner Salhany was highly critical of the note-taking practices of the officers who investigated their off-duty colleague's involvement in the accident. He explained that fundamental to proper note-taking are accuracy, comprehensiveness and timeliness:

[Note-taking] is not a burdensome task that police officers must reluctantly undertake because they were taught to do so at their police college. It is an integral part of a successful investigation and prosecution of an accused. ... The preparation of accurate, detailed and comprehensive notes as soon as possible after an event has been investigated is the duty and responsibility of a competent investigator.

...

... The notes should be made as close as possible in time to the event witnessed. At one time, witnesses were only permitted to refer their memory from notes if they could swear that they made the notes at the time or shortly after the event being recorded. ... However, the strictness of this rule has been relaxed for many years ...

...

This does not mean that officers are entitled to delay preparation of their notes. They should do so as soon as possible after an incident. There was a suggestion by some witnesses that if an officer has been unable to complete his or her notes before the shift has ended, the practice is to delay completing the notes until their next shift.

... This practice should be condemned by superior officers. A police officer who is questioning a witness or photographing a crime scene does not stop in the middle of taking the statement or photographing the scene because his or her shift has ended. The preparation of notes, where possible, should be completed before the officer leaves his or her shift.

***Salhany, Taman Inquiry, supra* at 133, 136-37**

34. The timing of the creation of notes is fundamental to their reliability. Unless notes are drafted when an event is fresh in the officer's mind, there is a substantial risk that they will contain errors, which can affect an officer's subsequent testimony in reliance on the notes.

***R. v. McKennon*, [2004] O.J. No. 5021 at paras. 23-25, 31, 32, 35 (S.C.J.), Respondents' BOA, Tab 26**

See also: Ontario Police College, *Basic Constable Training Program*, *supra* at 5, 11, 15, 16

35. The OPP Orders stipulate:

A member shall make all original investigative notes in a Form Cat. 1-22-Daily Journal during an investigation or as soon thereafter as practicable, but at all times, prior to the conclusion of the member's daily tour of duty, or as approved by a supervisor. Without exception, these original investigative notes shall be completed prior to the entry of such information on to other occurrence or information tracking systems, e.g. Niche RMS, CPIC and prior to their reviewing of any in-car audio or audio/video recordings.

OPP Orders, June 2009 Revision at s. 2.50.3, *supra* at 37 (see also 30); OPP Orders, March 2010 Revision at s. 2.50.3, *supra* at 55 (see also 48)

36. In addition to the elements outlined above, notes must be independent. Unless an officer's notes are free from the influence of other persons, there will be questions as to the reliability of the notes. Commissioner Salhany commented as follows on this issue:

There was testimony that [3 officers] collaborated in the preparation of their notes. For many years, police forces in Canada, relying on a British decision (*Bass (1953)*, 37 *Cr.App.R.* 51. See also *Archibald (1956)*, 116 *C.C.C.* 62 (*Que. S.C.*)), encouraged police officers to collaborate when making notes of the event provided that the notes were made while the events were fresh in their minds and provided that the notes contained only what each has observed. That practice is no longer considered by British authorities to be proper. (See [1985] *Crim. L.R.* 781 and the Metropolitan Police Officers Instruction Books, Chapter 6, paragraph 9.)

The practice is now considered improper: *Barrett (1993)*, 82 *C.C.C.* (3d) 266 (Ont. C.A.). The proper practice is for each officer to make his or her own independent set of notes. **When officers collaborate in preparing notes, there is a serious risk that one officer may unconsciously supplement something from the other officer's recollection which he or she never observed.** If it is then written down in the officer's notebook to be used to refresh his or her memory, it will become part of the officer's recollection even though he or she never saw it. Once combined memories are committed to a uniform set of notes, each officer will later refresh his or her memory as to an event that they never saw.

Salhany, *Taman Inquiry*, supra at 137 [emphasis added]

37. Ontario's Court of Appeal and lower courts have expressly rejected the police practice of making their notes in collaboration with others.

[Sgt. VanDemark] took no active part and made no contemporaneous notes of it, although he had his notebook with him in the interview room. His testimony was assisted by reference to entries in his notebook which he made after the interview was over. He made these notes by reading Sgt. Hanlon's notebook and, since he agreed with the content, he initialled Sgt. Hanlon's notebook and copied Hanlon's notes into his own book. When asked in cross-examination why he did not take his own independent notes while the interview was being conducted, he replied: "That's not the way we conduct our investigations." It is not for me to tell the hold-up squad how to proceed for investigative purposes, but in so far as there are evidentiary consequences to those practices, I can say that they are unsatisfactory. Whenever possible, every officer in attendance at the interview who will want to refer to his or her notes as a memory aid for the purpose of giving evidence should take contemporaneous, independent notes.

***R. v. Barrett*, (1993) 82 C.C.C. (3d) 266 at para. 17 (C.A.), per Arbour J.A. (as she then was); rev'd on other grounds [1995] 1 S.C.R. 752, Respondents' BOA, Tab 15; cited in *R. v. Flores*, [1994] O.J. No. 3124 at para. 54 (O.C.J. (Prov. Div.)), Respondents' BOA, Tab 21**

38. The failure of an officer to draft independent and contemporaneous notes renders later testimony based upon such notes vulnerable to attack. Testimony based upon notes that were not timely, or notes generated through officer collaboration, can be exposed as unreliable.

There are important reasons for requiring that officers prepare their notes independently. The purpose of notes made by a police officer is to record the observations made by that officer ... An officer with relevant evidence to offer may testify at trial as to the act or observations made by him or her. However, that officer is not permitted to testify as to the information received from other officers for the purpose of proving their truth. Such evidence [is] hearsay and inadmissible.

An officer's notes perform a valuable function at trial. It is usually many months, sometimes years, from the time of an occurrence to the time that the officer is called upon to testify at trial. Without the assistance of notes to refresh his or her memory, the evidence of the officer at trial would inevitably be sketchy at best. If the officer's notes are prepared without any indication of which is the officer's independent recollection and which is somebody else's recollection, there is every likelihood that that officer at trial will be "refreshing" his or her own memory with observations made by someone else. In effect, the officer will be giving hearsay evidence as if it was his or her own recollection rather than the observations of somebody else written into the notes without attribution.

...While it is inevitable and indeed necessary that the members of a police team confer with one another during the course of an investigation, it is nevertheless important that

the integrity of each officer's personal observations be preserved as much as possible. One way to achieve that result is for each officer to separately record his own observations in his own notebook as soon as possible after the event. To the extent that the officer obtains information about other officer's observations before doing her notes, her memory may become tainted with the observation of others and both her notes and her own evidence may be rendered less reliable.

... If the officers' notes do not reflect what is their own observations and what comes from others, the judge or jury ... will be unaware that they are not receiving ... independent evidence ... There is, therefore, a real danger that improper weight will be given to evidence as a result of a misapprehension as to the officers having independent recollections.

***R. v. Green*, [1998] O.J. No. 3598 at paras. 19, 20, 22, 23, 45 (O.C.J. (Gen. Div.)), Respondents' BOA, Tab 23**

***R. v. Mattis*, (1998) 20 C.R. (5th) 932 at paras. 21-23 (O.C.J. (Prov. Div.)), Respondents' BOA, Tab 24**

***R. v. Bowerbank*, [2001] O.J. No. 755 at paras. 47-48 (S.C.J.), Respondents' BOA, Tab 16**

***R. v. Fisher*, (2008) 78 W.C.B. (2d) 68 at para. 87 (Ont. S.C.J.), Respondents' BOA, Tab 19**

***R. v. Flores*, *supra* at paras. 54-56, 65, 66**

***R. v. McKennon*, *supra* at para. 35**

Ontario Police College, *Basic Constable Training Program*, *supra* at 4, 5

See also Salhany, *Taman Inquiry*, *supra* at 136: the evidentiary significance of proper note-taking should not be underestimated. In circumstances where the writer has no memory of the event, the notes may be entered into evidence for the truth of their contents as 'past recollection recorded.'

39. Lastly, with respect to format, while there is a duty to record the notes in proper form in an officer's duty book, circumstances may make it necessary for an officer to prepare rough notes at the scene. Commissioner Salhany commented that there was nothing inherently objectionable in an officer writing down rough notes at the scene (if the duty notebook is unavailable), and then transferring the notes to his or her duty notes. However, he stressed that the draft notes must be kept and attached to the duty book so the court can be satisfied as to the accuracy and reliability of the notes. The rough notes would be subject to disclosure to the defence along with the duty notes. This is consistent with the OPP Orders and Ontario Police College training curriculum, which expressly reference the importance of retaining original investigative notes recorded outside an officer's daily journal.

Salhany, *Taman Inquiry*, supra at 137

OPP Orders, June 2009 Revision at s. 2.50.3, supra at 37; OPP Orders, March 2010 Revision at s. 2.50.3, supra at 55

Ontario Police College, *Basic Constable Training Program*, supra 4, 6, 12, 15

40. Officer notes are central to the effective prosecution of cases that often occur much later than the original incident investigated. In recognition of the central role notes play in the proper administration of criminal justice, the OPP Orders clearly indicate that an officer's notebook "is the property of the OPP", rather than any individual officer. Such notebooks are retained at the forces Records Service Centre for a period of 20 years. That the notes are the property of the force not the officer is reflected in the SIU context by the fact that where an officer's designation changes to that of witness to subject, the Regulation stipulates that the officer's notes are to be returned to the chief of police, not the officer.

OPP Orders, June 2009 Revision at s. 2.50.1, supra at 35; OPP Orders, March 2010 Revision at 2.50.1, supra at 53

O. Reg. 673/98, at s. 10(3)(c)

The SIU Context - Implications of permitting counsel to influence the content of notes

41. Involving legal counsel (or an association representative) in the note-taking process is incompatible with the duties required of officers for proper note-taking. First, the delay involved in such consultation can adversely affect the timeliness of officer note-taking. Second, and more important, consultation with counsel in the note-taking process can compromise the independence of the notes, and this in turn may adversely impact upon a criminal investigation and prosecution. This will be the case in the context of an ordinary criminal investigation, but raises particular concern in the context of an SIU investigation where police conduct is at issue and there is a heightened public interest in ensuring both the integrity of the investigation, and the appearance of integrity.

42. The evidence indicates direct involvement on the part of counsel in delaying the preparation of officer notes, and in shaping the content of notes in the SIU context. Counsel (and

police associations) have actively advised officers against recording timely and independent notes, and have provided advice and suggestions to officers on the substance of their notes:

In May of 1997, the Metro Toronto Police Association appears to have issued the following notice to its member police officers:

...

Our Association role [sic] is to protect your legal rights by providing you with legal counsel.

Your role as an involved officer is to await your counsel's advice BEFORE YOU SAY OR WRITE ANYTHING.

Hon. George W. Adams, Q.C., *Consultation Report of the Honourable George W. Adams, Q.C. to the Attorney General and the Solicitor General Concerning Police Cooperation with the Special Investigations Unit (May 14, 1998) at 34, note 53* ["Adams Report, 1998"], Respondents' BOA, Tab 32 [emphasis in original]

The obvious needs to be said and said again: "He pointed the firearm at me and, fearing for my life and the life and safety of my fellow officers and members of the public, I fired at him several times."

You will note that I said several times. Most people who discharge their firearm at an armed suspect are unsure how many times they fired, and equally unsure whether or not to admit it. In a world of admit and explain, it is crucial that you allow yourself some margin of error in your account so that later the SIU does not begin to doubt your credibility/reliability.

...

Once upon a time, I was tempted to have a pencil manufactured with the slogan "shut the F up" embossed on it so that when police officers began to write their notes, they would pause and first give me or their association a call. I think I may still do it.

Lawyer Gary Clewley, "Officers and the SIU", *Hamilton Police Association Newsletter, Vol. 4:2 (2009), Affidavit of Ruth Schaeffer, Exhibit, Applicants' AR, Tab 2 at 23*

43. In the present case officers were instructed not to make their notes until they spoke with counsel. "Draft" notes were then provided to counsel rather than the SIU, and claims of solicitor-client privilege were asserted with respect to the drafts and any advice provided with respect thereto. Whether any revisions were made, or content suggested, between the first and final set of notes is not known as a result of the claim of privilege. Compounding the problem is the fact that subject and witness officers share the same counsel, heightening the risk of direct or

indirect collaboration, or information flow, through the lawyer who is professionally obliged to share all relevant information among all of his or her jointly retained clients.

Professional Standards Bureau Investigation Report re: Levi Schaeffer (November 30, 2009), Applicants' AR, Tab 4[A] at 33-37, 43-45; Professional Standards Bureau Investigation Report re: note taking (December 10, 2009), Applicants' AR, Tab 4[B] at 51-52, 55-59; Detective Sgt. D.M. Wellock Hand Written Notes (June 24, 2009), Supp. AR, Tab 2 at 3-4;

Professional Standards Bureau Investigation Report re: Douglas Minty, Applicants' AR, Tab 5[C] at 249; Handwritten Notes – Sergeant Michael Burton (June 26, 2009), Applicants' AR, Tab 5[D] at 263; SIU Follow Up Report re: Witness Officer Interview of Sergeant Michael Burton, Applicants' AR, Tab 5[J] at 298

See also: Schaeffer SIU Report, *supra* at 78, 83, 86, 88, 92-94; Minty SIU Report, *supra* at 229-231, 238

44. The fact that an SIU-investigated incident involves an inquiry into potential officer misconduct does not affect a witness or subject officer's duty to make notes in keeping with the requirements of accuracy, comprehensiveness, timeliness and independence. As explained by the Court of Appeal in *Kerr*, and by the Superior Court in *Schertzer* (cited at paragraphs 26-27, *supra*), the duty to make notes arises as a professional duty, and not from the fact of an investigation into officer misconduct. As set out above, ss. 9(1), (2) and (3) of the Regulation require witness officers to complete notes made in accordance with their professional duty for their chief, who will provide them to the SIU; and subject officers to complete similar notes for their chief, who will not pass them to the SIU, but will use the notes for other purposes that do not expose subject officers to penal liability.

***Kerr, supra* at para. 11, 13**

***R. v. Schertzer, supra* at paras. 14-16, 21**

45. Whether the legislated right to counsel (in the Regulation) or constitutional considerations have any bearing on this question is considered in the following section.

The legislated right to counsel – s. 7 of the Regulation

46. The existence of an expressly legislated right to counsel (or an association representative) in s. 7 of the Regulation does not alter the requirements of an officer's note-taking duty, nor does it permit an officer to involve counsel in the note-taking process. It does not permit officers to

submit a first draft of notes to counsel for review, or support a claim for privilege over such a draft.

O. Reg. 673/98 at s. 7

47. An officer's legislated right to counsel is set out as follows:

7. (1) Subject to subsection (2), every police officer is entitled to consult with legal counsel or a representative of the association and to have legal counsel or a representative of the association present during his or her interview with the SIU.

(2) Subsection (1) does not apply if, in the opinion of the SIU director, waiting for legal counsel or a representative of the association would cause an unreasonable delay in the investigation.

O. Reg. 673/98 at s. 7

48. The right to counsel is provided in connection with the SIU interview. The right would presumably include the right to meet with counsel (or an association representative) to prepare for the interview.

49. The Regulation is silent on the issue of whether officers are permitted to consult counsel during the note-taking process. The OPP Orders, which provide instructions and guidance to officers on how to implement legislative directives, also do not explicitly address this issue. Although the Orders refer to the duty of senior police officers to ensure involved officers are provided counsel, the Orders focus on SIU interviews, and do not directly concern themselves with any right to consult counsel in the note-taking process.

Upon being advised of an incident, which may require the involvement of the SIU, a supervisor shall:

...

- Obtain approval for immediate legal counsel for involved members, offer or arrange legal counsel and ensure no interviews are conducted with subject officers or involved officers until after the officers have had an opportunity to talk to counsel;

OPP Orders, June 2009 Revision at s.2.5.23, *supra* at 29-30 (see also 31-32, 43 [Field Guide]); OPP Orders, March 2010 Revision at s. 2.5.24, *supra* at 47-48 (see also 49-50, 61 [Field Guide])

50. An express limitation on the exercise of the right to counsel is found at s. 7(2) of the Regulation. In recognition of the importance of timing in SIU's investigations, the Regulation stipulates that the right to consult counsel is subordinated to the need for timeliness in the SIU investigation.

O. Reg. 673/98 at s. 7(2)

51. In this Respondent's submission, the incompatibility between the proper fulfilment of an officer's professional note-taking duty and the officer's consultation with counsel in the note-taking process indicates that the right to counsel in s. 7 of the Regulation cannot be deemed to authorise counsel's involvement in the note-taking process. This interpretation also flows from an examination of the entire legislative scheme and its purpose.

52. The interpretation of the scope of the right to counsel in s. 7 cannot be determined through an examination of the Regulatory provision in isolation. As the Supreme Court has held, "words...take their colour from their surroundings." A proper interpretation must assess the legislative provision in context:

as recognized in *Rizzo & Rizzo Shoes* "statutory interpretation cannot be founded on the wording of the legislation alone" (at para. 21).

...

In interpreting legislation, the guiding principle is the need to determine the lawmakers' intention. To do this, it is not enough to look at the words of the legislation. Its context must also be considered.

***Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141 at paras. 9, 12, Respondents' BOA, Tab 7; citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, Respondents' BOA, Tab 30**

***Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 27, Respondents' BOA, Tab 2**

53. A contextual analysis is central to the Supreme Court's modern approach to the interpretation of statutes:

[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

***Bell ExpressVu, supra* at para. 26; citing Driedger's Modern Principle, quoted in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis, 2008) at 1, Respondents' BOA, Tab 39**

54. When employing a contextual analysis, the interpretation of a reviewing court is necessarily informed by a series of factors, including, *inter alia*, the principle of interpreting legislation harmoniously, in a manner which avoids anomalous or absurd results. A legal presumption of coherence applies in respect of the constituent elements of a legislative scheme:

It is presumed the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal. This presumption is the basis for analyzing legislative schemes, which is often the most persuasive form of analysis. The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other.

***Sullivan on the Construction of Statutes, supra* at 223**

See also *Poulin v. Serge Morency et Associés Inc.*, [1999] 3 S.C.R. 351 at paras. 31-33, Respondents' BOA, Tab 10

55. In this Respondent's submission, s. 9 of the Regulation supports the view that the right to counsel under s. 7 is not triggered during the note-taking process. Specifically, this right cannot include consultation on officer's notes. Section 9 refers to a witness or subject officer's duty to make notes in accordance with his or her (professional) duty and contains no reference to consultation with counsel to that end. It is clear that s. 9 is not intended to displace or alter the professional duty of the officer in regard to note-taking. In fact, s. 9's provisions depend on the officer fulfilling that duty properly. The notes contemplated in s. 9 are precisely the notes that an officer is expected to produce in any matter, whether or not the SIU is involved. As set out above, police notes are to be independent and timely. If consultation with counsel pursuant to s. 7 can compromise these requirements, such consultation is by implication precluded in the note-taking process. Section 7 cannot be read in such a manner as to impair the officer's professional note-taking duty, as that would frustrate the purposes of s. 9.

O. Reg. 673/98 at s. 9

***Kerr, supra* at paras. 11-13**

***R. v. Schertzer, supra* at paras. 14, 16, 21**

56. Section 6 of the Regulation also confirms that the right to counsel does not extend to counsel participating in the note-taking process or influencing the content of the notes. Section 6 requires the segregation of officers involved in an incident, and prohibits communication among officers until the conclusion of the SIU interviews. This provision is intended to ensure the integrity of the evidence and information gathered by SIU investigators. If counsel influences officer note-taking prior to delivery of the notes to the SIU, the integrity of the SIU investigation can be compromised. Moreover, consultation with counsel during or before the note-taking process can create a perception of conferral on the substance of the notes, which cannot be probed or dispelled due to the veil of privilege. This is particularly so in the case of a joint retainer (discussed further below).

O. Reg. 673/98 at s. 6

See also: OPP Orders, June 2009 Revision, *supra* at 29-31; OPP Orders, March 2010 Revision, *supra* at 47-49 (general prohibition on officers who arrive at the scene from communicating with police involved in the incident)

57. Further, s. 11 of the Regulation supports this Respondent's submission on the proper interpretation of the right to counsel under s. 7. Section 11 contemplates internal police investigations into incidents involving serious injuries and deaths arising from incidents involving the police. These internal investigations are subordinate to the SIU's role as lead investigator. However, they serve an important administrative and regulatory function: "to review the policies of or services provided by the police force and the conduct of its police officers." All officers are obligated to co-operate fully with such investigations, and the notes of both witness and subject officers form a significant component of the record reviewed for this purpose. If counsel are involved in the note-taking process or are permitted to influence officer note-taking, the purpose of s. 11 can be frustrated by compromising the reliability of the information available to the chief of police.

O. Reg. 673/98 at s.11

58. This Respondent's view as to the scope of the right to counsel in s. 7 of the Regulation also conforms with the overall purpose of the legislative scheme. As the Supreme Court held in *Covert v. Nova Scotia*:

The correct approach, applicable to statutory interpretation generally, is to construe the legislation with reasonable regard to its object and purpose and to give it such interpretation as best ensures the attainment of such object and purpose.

***Covert v. Nova Scotia*, [1980] 2 S.C.R. 774 at 807, Respondents' BOA, Tab 5**

***Rizzo & Rizzo Shoes*, *supra* at para. 21**

***Bell ExpressVu*, *supra* at para. 26**

See also *R. v. Adams*, [1995] 4 S.C.R. 707 at 719, Respondents' BOA, Tab 14

59. This approach is consistent with s. 64(1) of the *Legislation Act, 2006*, which states that every Act shall be given such "interpretation as best ensures the attainment of its objects."

***Legislation Act, 2006*, R.S.O. 2006, c.21, Sch. F, s. 64(1)**

60. Direct evidence of legislative purpose is derived from the statute itself, and the language employed therein. Section 113 of the *Act* indicates that overall purpose of the legislative scheme is to provide an independent and effective mechanism to conduct criminal investigations of possible officer misconduct that has resulted in serious injury or death:

113. (5) The director may, on his or her own initiative, and shall, at the request of the Solicitor General or Attorney General, cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers.

...

(7) If there are reasonable grounds to do so in his or her opinion, the director shall cause informations to be laid against police officers in connection with the matters investigated and shall refer them to the Crown Attorney for prosecution

***Police Services Act*, *supra* at ss. 113(5), (7)**

61. Section 113(3) of the *Act* adds that serving or former police officers "shall not be appointed as director" of the SIU. In addition, s. 113(6) prohibits investigators from involvement "in an investigation that relates to members of a police force of which he or she was a member." Thus the legislation is intended to ensure that the SIU exercises independent oversight.

Police Services Act, supra at ss.113(3), (6)

62. As the Ombudsman of Ontario recently observed:

When civilians are seriously injured or killed at the hands of police, it is critical that the results of the consequent criminal and administrative investigations are exposed to public view—to ensure confidence not only in police oversight, but also in policing itself. That was the intent behind the creation of the SIU.

Ombudsman of Ontario, *Oversight Unseen: Investigation into the Special Investigation Unit’s operational effectiveness and credibility* (September 2008) at para. 317 [“Ombudsman’s Report”], Respondents’ BOA, Tab 37

See also *Adams Report, 1998, supra at 81*

63. The scope of the right to counsel in s. 7 of the Regulation must be informed by the important independent oversight and investigative function of the SIU, both for the proper administration of justice and for public confidence in policing itself. Consultations with counsel on police notes (even if counsel do not suggest content) can undermine public confidence in the integrity of the notes, and thus the integrity and reliability of SIU investigations, eroding the legislation’s overarching public accountability rationale. This risk of undermining public confidence is highlighted by the fact that all communications take place under the shroud of solicitor-client privilege and cannot be reviewed by investigators or courts.

Adams Report, 1998, supra at 33, 34, 36, 81

Affidavit of Diane Pinder at para. 8, Applicants’ AR, Tab 3 at 27

Affidavit of Ruth Schaeffer at para. 6, Applicants’ AR, Tab 2 at 17

Professional Standards Bureau Investigation Report re: Levi Schaeffer, dated Nov. 30, 2009, Applicants’ AR, Tab 4[A] at 50

Pritchard v. Ontario, [2004] 1 S.C.R. 809 at paras. 15-16, Respondents’ BOA, Tab 11

64. Consultation with counsel in the note-taking process also deviates from the purpose of s. 7, as reflected in the legislative history. The genesis of the Regulation was the 1998 *Consultation Report of the Hon. George W. Adams, Q.C. to the Attorney General and Solicitor General concerning police co-operation with the Special Investigations Unit*. Several of the Report’s recommendations, including the right to counsel in s. 7, were entrenched in the Regulation made the same year. With respect to the right to counsel, the Report stated:

There was also broad agreement that an officer was entitled to legal and police association representation **at SIU interviews**, provided such representation did not result in unwarranted delay.

Adams Report, 1998, supra at 90 [emphasis added]

65. In 2002, the Honourable Mr. Adams was again retained by the Attorney General of Ontario to review implementation of the Regulation. His second report, entitled *Review Report on the Special Investigations Unit Reforms prepared for the Attorney General of Ontario by the Hon. George W. Adams, Q.C.* was delivered in February 2003. In reference to the apparent role of counsel in the note-taking process, the Report observed:

In some cases, officers have received legal advice to refrain from completing their notes until they have consulted with their lawyers. **This is very problematic.**

Hon. George W. Adams, Q.C., *Review Report on the Special Investigations Unit Reforms prepared for the Attorney General of Ontario*, (February 26, 2003) at 55 [“Adams Report, 2003”], Respondents’ BOA, Tab 33 [emphasis added]

66. Properly interpreted, s. 7 of the Regulation does not authorise police officers to involve counsel in the note-taking process.

Constitutional considerations

67. The *Charter* does not provide officers with a constitutionally protected right to consult counsel in the note-taking process of an SIU investigation.⁵ The *Charter* right to counsel is set out in s. 10(b):

Everyone has the right on arrest or detention

...

(b) to retain and instruct counsel without delay and to be informed of that right; ...

***Canadian Charter of Rights and Freedoms* [“Charter”], Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 at s. 10(b)**

⁵ As the Regulation clearly permits officers to be represented by counsel at the SIU interview, the questions of whether the SIU interview itself is a “detention” and whether there is a *Charter* right to be represented by counsel at the interview are not live issues. Notably, a subject officer is not required to submit to an interview, pursuant to s. 8 of the Regulation.

68. The *Charter* right to counsel is only triggered upon “arrest” or “detention”. Except in the most extraordinary circumstances where an officer is arrested immediately by his or her colleagues, neither subject nor witness officers are under arrest or in detention during the note-taking process.

69. The test for detention was recently set out by the Supreme Court in *R. v. Grant*:

Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest **by a significant physical or psychological restraint**. Psychological detention is established either where the **individual has a legal obligation to comply with the restrictive request or demand**, or **a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply**.

In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:

- (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
- (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
- (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

***R. v. Grant*, [2009] 2 S.C.R. 353 at para. 44, Respondents' BOA, Tab 22 [emphasis added]**

70. In the present context officers involved in an incident being investigated by the SIU may assert a claim that they are subject to “significant physical or psychological restraint” and thus detained triggering a right to counsel under the *Charter*. The Regulatory requirement that involved officers be segregated from each other and not communicate with one another cannot, in this Respondent’s submission, be construed as detention. Subject to completion of their professional duties at the scene and the fulfilment of their professional obligation to complete their shift, officers are free to come and go as they please: neither the Regulation nor the SIU imposes a constraint on their liberty of movement. The only restriction is on congregation and communication with other involved officers. Similarly, the obligation upon officers to complete

and turn over their notes to their chief is not akin to a “restrictive demand or request”, and an officer who fails to comply is subject only to disciplinary sanction, not arrest. (Furthermore, the imposition, as a condition of a person’s continued employment, of a requirement that the person fulfil his or her professional duties, is not a restriction of liberty as protected by the *Charter* or any other rights contained therein.)

O. Reg. 673/98 at ss. 6(1), (2)

O. Reg. 123/98 at Sched., s. 2(1)(c)

***Police Services Act, supra* at ss. 80-85**

***R. v. Grant, supra* at para. 34**

***Ombudsman’s Report, supra* at para. 262**

***R. v. Fitzpatrick, supra* at paras. 37-41**

See also: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at para. 72, Respondents’ BOA, Tab 13; *Mussani v. College of Physicians and Surgeons of Ontario* (2004), 74 O.R. (3d) 1 at paras. 41, 43 (C.A.), Respondents’ BOA, Tab 8

71. In *Grant* the Court held that significant psychological restraint may also be established where “a reasonable person in the individual’s circumstances would conclude that he or she had been deprived by the state of the liberty of choice.” This test, however, must be evaluated in context:

This second form of psychological detention -- where no legal compulsion exists -- has proven difficult to define consistently. The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand. **As held in *Therens*, this must be determined objectively, having regard to all the circumstances of the particular situation, including the conduct of the police...[T]he focus must be on the state conduct in the context of the surrounding legal and factual situation, and how that conduct would be perceived by a reasonable person in the situation as it develops.**

... To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements.

***R. v. Grant, supra* at paras. 31-32 [emphasis added]**

72. In the present case, a reasonable person would not conclude that an officer’s ordinary duty to remain at the scene of an incident until relieved by back-up, to complete his shift unless

relieved of that obligation, and to complete notes of the incident in his memo book, is tantamount to significant psychological restraint, and thus meets the definition of a detention.

73. In *R. v. Suberu*, the Court applied the test in *Grant* in a case where an officer impeded an individual's departure by stating "wait a minute. I need to talk to you before you go anywhere". Concluding that no detention had taken place triggering a right to counsel under the *Charter*, the Court stated that the objective approach in *Grant*

... does not mean that every interaction with the police will amount to a detention for the purposes of the Charter, **even when a person is under investigation for criminal activity.**

***R. v. Suberu*, [2009] 2 S.C.R. 460 at paras. 9, 23, Respondents' BOA, Tab 28 [emphasis added]**

74. The three sets of factors provided in *Grant* (set out above at para. 69) intended to guide a determination as to whether a reasonable person in the individual's circumstances would conclude that she had been deprived of liberty of choice, militate against a finding of detention by the SIU:

The circumstances giving rise to the encounter: The request for notes arises simply from the SIU's statutory mandate to "cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers". Although the SIU's investigation is restricted only to those officers (subject and witness) involved in an incident, the Court has indicated that "[f]ocussed suspicion, in and of itself, does not turn the encounter into a detention".

***Police Services Act, supra* at s. 113(5); *R. v. Grant, supra* at para. 41**

The nature of the state conduct: The state conduct in the instant case is not commensurate with a detention. An SIU request for an officer's notes (which is done in writing) has no physical dimension or any element superadded to the officer's pre-existing professional duty.

The characteristics of the individual: In the instant case the individual is the police officer, a sophisticated party trained in law enforcement, including the rules respecting detention of suspects and the provision of *Charter* rights, and also aware of their own

professional duties. A reasonable person in the circumstances of a police officer would not likely conclude that an obligation to prepare and submit notes on an incident is tantamount to a detention.

75. A notion that an officer requires the protection of counsel because he or she may be or become a subject officer, and therefore, should not be compelled to compromise his or her right against self-incrimination by making notes without the assistance of counsel, is irrelevant in the SIU context. Section 9 of the Regulation stipulates that a subject officer's notes cannot be provided to the SIU (and if provided prior to the officer becoming a subject officer, the originals and all copies must be returned under s. 10). Accordingly, the Regulation contemplates the use and derivative use immunities against self-incrimination that are reflected in ss. 7, 11(c) and 13 of the *Charter*. A subject officer's notes cannot, pursuant to the Regulation, be used in the SIU context to incriminate the officer. As the Honourable Mr. Adams noted in his 2003 *Review Report*, a Directive from the Attorney General to Crown prosecutors has ensured that subject officers' "notebook accounts and any evidence that would not have been found but for their notebook accounts will not be used to incriminate the officers in any subsequent criminal proceeding." There is, therefore, no need for the involvement of counsel in the note-taking process in order to protect a subject officer from self-incrimination. In any event, the right against self-incrimination would not authorise interference by counsel in the content of officer notes.

O. Reg. 673/98 at ss. 9, 10

***Charter* at ss. 7, 11(c), 13**

***Adams Report, 2003, supra* at 49-50, 54**

Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf (Toronto: Carswell, 2007) at 47-70 – 47-72, Respondents' BOA, Tab 34

See also: *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at paras. 2, 7, 35-37, 41-42, Respondents' BOA, Tab 4

76. Accordingly, this Respondent submits that there is no constitutional right to have counsel involved in the note-taking process.

Issue II: Is an assertion of solicitor-client privilege over a “draft” of officer notes compatible with the officer’s professional duty to prepare independent and contemporaneous notes of an incident?

77. For the reasons set out under Issue I, the assertion of solicitor-client privilege over a draft of officer notes is not compatible with the officer’s professional duty to prepare notes of an incident. As s. 9 of the Regulation depends upon the preparation of the officer’s notes in accordance with his professional duty, the claim of privilege is also incompatible with the legislative scheme.

78. The question of whether privilege attaches to the particular draft officer notes in the Schaeffer investigation is not ripe for determination on the present Application. This Respondent submits that the assessment of a claim of privilege attaching to a particular document should be reserved to an appropriate case where there is a live issue of documentary production, such as a civil action for damages, a response to a summons or motion to quash a summons, or a criminal or administrative proceeding in which production of the document is sought to be compelled.

79. If such a privilege claim is sustained, it will permanently shroud the officer’s draft notes from scrutiny by investigators and the courts, raising significant and possibly unresolvable issues concerning the integrity of inquiries into alleged officer misconduct. Such issues do not arise if, as submitted under Issue I above, counsel are not involved in the note-taking process.

Issue III: Does a subject or witness officer have the right to retain the same lawyer or law firm as other subject or witness officers involved in an incident being investigated by the SIU? Is such a right consistent with the Regulation which provides that officers should be segregated from each other and shall not communicate with each other prior to the completion of SIU interviews?

80. This Respondent submits that a police officer’s right to counsel in an SIU investigation does not entail the right to share the same lawyer as other officers. As fiduciaries, jointly retained counsel (and their firms) are professionally obliged to share information among clients, which may lead to communication, whether intended or inadvertent, direct or indirect, among

officers, despite the regulatory prohibition on officer communication. In the result, the public interest in ensuring the integrity of evidence gathered by SIU investigations precludes multiple officers using the same counsel or law firm.

81. As a general principle, individuals are free to select the counsel they wish.

The right of an accused to retain counsel of his choice has long been recognized at common law as a fundamental right.

***Re Regina and Speid* (1983), 43 O.R. (2d) 596 at 2 (C.A.) (QL) per Dubin J.A., Respondents' BOA, Tab 12**

82. In a subsequent ruling affirming *Speid*, the Court of Appeal indicated that the rationale underlying the right to retain counsel of choice is significant:

The solicitor-client relationship is anchored on the premise that clients should be able to have complete trust and confidence in the counsel who represent their interests. Clients must feel free to disclose the most personal, intimate and sometimes damaging information to their counsel, secure in the understanding that the information will be treated in confidence and will be used or not used, within the boundaries of counsels' ethical constraints, in the clients' best interests. The law recognizes the uniqueness of this confidential relationship by providing special protection from compelled disclosure of information that is exchanged between clients and their counsel.

In addition, the relationship of counsel and client requires clients, typically untrained in the law and lacking the skills of advocates, to entrust the management and conduct of their cases to the counsel who act on their behalf. There should be no room for doubt about counsel's loyalty and dedication to the client's case. It is human nature that the trust and confidence that are essential for the relationship to be effective will be promoted and more readily realized if clients have not only the right to retain counsel but to retain counsel of their choice.

***R. v. McCallen*, (1999) 43 O.R. (3d) 56 at paras. 34-35 (C.A.), Respondents' BOA, Tab 25**

83. Nevertheless, the Court of Appeal has observed that the right to retain counsel of choice is not absolute.

...[A]lthough it is a fundamental right and one to be zealously protected by the court, **it is not an absolute right and is subject to reasonable limitations...**

In assessing the merits of a disqualification order, **the court must balance the individual's right to select counsel of his own choice, public policy and the public**

interest in the administration of justice and basic principles of fundamental fairness. Such an order should not be made unless there are compelling reasons.

Speid, supra at 2-3; McCallen, supra at para. 68 [emphasis added]

84. It is well understood that the individual's right to select counsel does not include a right to select a counsel who has a conflict of interest. Similarly, it does not include the right to select that particular counsel who is in possession of confidential information from another source which by law, or for reasons of ethics or professional duty, the lawyer should not divulge to the prospective client. The individual's retainer of that particular lawyer would place the lawyer in a conflict of interest, as he or she would then be obliged to share that confidential information with the new client.

85. In the present case, public policy and the public interest in the administration of justice dictate that officers involved in an SIU investigation should be precluded from sharing the same lawyer. Section 6 of the Regulation clearly stipulates that officers involved in an incident are to be segregated and "shall not communicate with any other police officer involved" until after the SIU has completed its interviews. This common investigative safeguard is intended to prevent possible collusion and tailoring of evidence, whether intended or inadvertent.

O. Reg. 673/98 at s. 6

86. Pursuant to the Law Society of Upper Canada's *Rules of Professional Conduct*, where a lawyer accepts employment from multiple clients, "no information received in connection with the matter from one can be treated as confidential so far as the others are concerned." This rule is consistent with the related jurisprudence which indicates that no privilege exists between multiple clients consulted on a matter of common interest. Given the duty of loyalty a lawyer owes to each client, he or she cannot keep information received from one client confidential when advising another client.

Law Society of Upper Canada, *Rules of Professional Conduct* at Rule 2.04(6) "Joint Retainers", Respondents' BOA, Tab 35

***R. v. Dunbar* (1982), 68 C.C.C. (2d) 13 at para. 57 (Ont. C.A.), Respondents' BOA, Tab 18; cited in *Pritchard v. Ontario, supra* at para. 23**

***Davey v. Woolley et al.* (1982), 35 O.R. (2d) 599 at 3-5 (C.A.) (QL), Respondents' BOA, Tab 6**

87. As a result, each time a jointly retained lawyer consults with more than one involved officer, given his or her professional obligation to share information, there is minimally an appearance of conferral, which undermines the s. 6 prohibition of officer communication, and the public interest objective of ensuring the integrity of the evidence gathered by SIU investigators.

Handwritten notes of P.C. Kris Wood, dated June 22/23, 2009, Applicants' AR, Tab 4[H] at 176

88. In his 2003 *Review Report on the Special Investigations Unit Reforms*, the Honourable Mr. Adams stated that, "one lawyer acting for multiple witness officers and, surprisingly, even including subject officers" is a practice that "can offend both the spirit and the law of civilian oversight."

Adams Report, 2003, supra at 44-45

89. The practice of multiple officers sharing the same lawyer diminishes public confidence in the efficacy of the SIU:

Some community representatives expressed the view that even where officers are segregated, the practice of one police association lawyer representing multiple officers makes this meaningless. They contended that lawyers have a professional obligation to disclose to each of their clients what the others have told them, otherwise they would be in a conflict of interest. In that way, officers learn the recollections of their colleagues and can conceivably alter their recollections.

Adams Report, 1998, supra at 36; see also at 33

90. It is not a satisfactory solution to this problem for counsel to obtain from each client officer irrevocable consent and direction not to share the information received from the others until after SIU interviews are completed. As such arrangements would be subject to solicitor-client privilege, there will be no way in which the SIU, the courts or any other party can ensure that the particular arrangements in a given case are sufficient and being observed. Even if such arrangements are in place and being followed scrupulously, the issue of public perception and confidence will remain unaddressed.

91. In any event, the Rules do not permit waiver of the duty to share information in a joint retainer situation. The inability of a lawyer to waive this duty is consistent with the fiduciary duty owed to all jointly retained clients. As the Commentary to Rule 2.03(1) notes, a lawyer is not able to render effective professional service to his or her clients “unless there is full and unreserved communication” between counsel and the clients.

Law Society of Upper Canada, *Rules of Professional Conduct* at Rule 2.03(1) “Confidentiality”, Respondents’ BOA, Tab 35

Law Society of Upper Canada, *Professional Regulation Committee Report to Convocation*, (Nov. 8, 2001) at 4-5, Respondents’ BOA, Tab 36

92. In analogous circumstances where one counsel has purported to represent both individual officers and the Police Services Board before a Coroner’s inquest, the Divisional Court has recognized the conflict of interest, and affirmed the decision to disqualify counsel on public interest grounds:

Minimally, it seems to me that where the conflict involves the public interest, such that counsel’s continued joint representation would tend to undermine the public confidence in the administration of justice and the integrity of the process, the coroner should be able to act under s.50(1) to cure the defect.

***Booth v. Huxter*, (1994) 111 D.L.R. (4TH) 111 at para. 68 (see also paras. 51-52), (Ont. Ct. (Gen. Div) - Div. Ct.), Respondents’ BOA, Tab 3**

Constitutional Considerations

93. As set out above under Issue I, there is no *Charter* protected right to consult counsel during the note-taking process.

94. Even if *Charter* s.10(b) were applicable, the right to counsel does not include a constitutional right to the counsel of one’s choice.

The right to counsel conferred by s.10(b) is not a right to conscript the services of any lawyer whom the accused may choose.

Hogg, *Constitutional Law of Canada*, supra at 50-17

...while an individual may have the constitutional right to competent counsel to ensure a fair trial, he does not have a right to the counsel of his choice.

***R. v. Drury*, (2000) 150 Man. R. (2d) 64 at para. 52 (C.A.); leave to appeal ref'd [2000] S.C.C.A. No. 619, Respondents' BOA, Tab 17**

See also *Attorney General Quebec v. R.C.*, [2003] Q.J. No. 7541 at para. 141 (Que. C.A.), Respondents' BOA, Tab 1; *R. v. Williams*, (2001) 208 Sask. R. 79 at para. 14 (Q.B.), Respondents' BOA at Tab 29

95. As the Court articulated in *Spellacy*

Freedom of choice of counsel is not essential to the fulfilment of the right to counsel. The right to counsel is an objective one. The subjective feeling of satisfaction of the Applicant does not concern the judicial system. The Charter of Rights does not constitutionalize a right to counsel of one's choice.

***Spellacy v. Newfoundland*, (1991) 28 A.C.W.S. (3d) 548 at 10 (Nfld. S.C.) (QL), Respondents' BOA, Tab 31**

96. Even if an individual's preference for a particular counsel warrants some measure of deference, the *Charter* does not protect a person's right to select the same counsel as other persons – whether they be witnesses or co-accuseds. The need to avoid a conflict of interest, its appearance, or improper collusion or communications amongst subjects of investigation and witnesses, all count against *Charter* protection of joint retainers in such circumstances.

***Speid, supra* at 2-3**

Issue IV: Are police forces permitted under the legislation to de-brief civilian witnesses prior to the SIU?

97. Police guidelines permit contact with witnesses prior to the arrival of the SIU for the purpose of ensuring witness availability. Nevertheless, in the Minty incident, witness contact by the police exceeded this limited mandate. Prior to the arrival of the SIU two material civilian witnesses were approached by the subject officer himself—communication which did not cease until the intervention of a supervising officer.

OPP Orders, June 2009 Revision *supra* at 42 [Field Guide]; OPP Orders, March 2010 Revision *supra* at 60 [Field Guide];

SIU Follow Up Report re: Witness Officer Interview of Sgt. Michael Burton, Applicants' AR, Tab 5[J] at 297

98. Thereafter, according to an officer who attended the scene, the same civilian witnesses were taken by Sergeant Thompson “to Detach for an interview.” En route, these witnesses provided information to the Sergeant that was subsequently written-up in the officer’s notes. Although the OPP investigation into the propriety of this conduct concluded that Sgt. Thompson did not actively solicit statements from the witnesses, the Sergeant involved did not advise the civilians to cease speaking with her, or to one another, until the SIU took control of the investigation pursuant to its statutory mandate.

Handwritten Notes – Sergeant Michael Burton (June 26, 2009), Applicants’ AR, Tab 5[D] at 268;

Handwritten notes of Sgt. A. Thompson re Minty, AR, Tab 5[L] at 314-316;

Professional Standards Bureau Investigation Report re: Douglas Minty, Applicants’ AR, Tab 5[C] at 251;

Examination of Angela Mercer, April 15, 2010, pp. 33-34

Minty SIU Report, *supra* at 238

99. The primacy of the SIU in investigations is entrenched in s. 5 of the Regulation, which states:

5. The SIU shall be the lead investigator, and shall have priority over any police force, in the investigation of the incident.

O. Reg. 673/98, at s. 5

100. Section 11 of the Regulation contemplates internal disciplinary investigations into incidents by a chief of police, but notes that such investigations are nevertheless “subject to the SIU’s lead role”.

O. Reg. 673/98 at s. 11(1)

101. Further, s. 12 expressly prohibits officers from disclosing “to any person any information with respect to the incident” while an SIU investigation is underway.

O. Reg. 673/98 at s. 12(2)

102. The de-briefing of civilian witnesses prior to the arrival of the SIU is inconsistent with these legislative requirements. Such practice compromises the ability to control the incident

scene, thereby undermining public confidence in the efficacy of the SIU's independent oversight. As community representatives articulated to the Honourable Mr. Adams in the context of his initial Review in 1998:

The community representatives expressed similar concerns with respect to the control of the incident scene. Unauthorized acts and failures to protect a scene suggested to them carelessness or perhaps even an intention to degrade the evidence at the scene prior to the arrival of the SIU. They pointed to the fact that civilian witnesses are routinely identified, interviewed at the scene and then released by the involved police services before the SIU's arrival.

Adams Report, 1998, supra at 33 (see also 87)

Issue V: Is notification of the police association and/or the media prior to notification of the SIU consistent with the requirement for immediate notification in the Regulation?

103. In the Minty investigation notification to the SIU was delayed for more than one-and-a-half hours. Prior to notification being provided to the SIU, the OPPA and a media representative were both advised of the incident.

Minty SIU Report, supra at 212, 215, 236, 237

Professional Standards Bureau Investigation Report re: Douglas Minty, Applicants' AR, Tab 5[C], at 250;

Handwritten Notes – Sergeant Michael Burton (June 26, 2009), supra at 263

104. In the Schaeffer investigation notification to the SIU was delayed for a period of 3 hours. Although the shooting occurred at 12pm, the SIU was alerted about the incident at 3pm.

Schaeffer SIU Report, supra at 63

105. Under s. 3 of the Regulation, the Chief of Police must immediately advise the SIU should an incident within the SIU's mandate over "serious injuries and deaths that may have resulted from criminal offences committed by police officers" occur. In the instant cases, the SIU's jurisdiction was plainly not in issue, as each incident involved a shooting of a civilian by an OPP officer. Immediate notification was nevertheless inexplicably delayed.

O. Reg. 673/98 at s. 3; Police Services Act, supra at s. 113(5)

OPP Orders, June 2009 Revision at s.2.5.23, supra at 28; OPP Orders, March 2010 Revision at s.2.5.24, supra at 46

106. Late notification has significant repercussions on the integrity of SIU investigations. It can result, *inter alia*, in the loss of evidence and the contamination of the physical material at the scene. As the OPP Commissioner has noted, in the context of investigating crime:

It's really important to hit the scene quickly, take that immediate charge, make an assessment of what the priorities are... Evidence very often evaporates, witnesses walk away, stories change ... scenes change

Ombudsman's Report, supra at para. 109 (see also paras. 79, 81)

107. Nevertheless, the problem of late notification persists, eroding public confidence in the effectiveness of SIU oversight. According to one observer, no less than 1/3 of all shooting incidents examined from 2003 through mid-2007 involved notification to the SIU that was delayed by one hour or more. In some cases, SIU notification is actually provided by third parties.

It is equally disconcerting to discover the number of cases where it is not the police who notify the SIU, but third parties. Out of 856 incidents occurring from 2003 to June 2007, there were 76 cases where the SIU learned about the matter from affected individuals and their relatives, advocates, Crown Attorneys, coroners and the media—rather than the police force involved.

Ombudsman's Report, supra at para. 105; Adams Report, 2003, supra at 37

108. Notification by police of third parties prior to the SIU, or failure to notify the SIU before a third party has notified the SIU, are incompatible with both the letter and spirit of the Regulation.

PART IV - ORDER REQUESTED

109. The SIU supports the relief sought by the Applicants, and requests a Declaration that the conduct of the Respondent Officers and the Commissioner of the OPP in respect of the SIU investigations into the police shooting deaths of Douglas Minty and Levi John Schaeffer violated section 113 of the *Police Services Act*, R.S.O. 1990, c.P.15, and Ontario Regulation 673/98.

110. The SIU does not seek an order respecting costs.

All of which is respectfully submitted.

May 7, 2010

Robin K. Basu
Constitutional Law Branch

Arif Virani
Constitutional Law Branch

Dennis W. Brown Q.C.
Crown Law Office – Civil

James Kendik
Crown Law Office – Civil

Counsel for the Respondent,
Ian Scott, Director of the SIU

SCHEDULE “A”

Authorities	
1.	<i>Attorney General Quebec v. R.C.</i> , [2003] Q.J. No. 7541 (Que. C.A.)
2.	<i>Bell ExpressVu Limited Partnership v. Rex</i> , [2002] 2 S.C.R. 559
3.	<i>Booth v. Huxter</i> , (1994) 111 D.L.R. (4 th) 111 (Ont. Ct.(Gen.Div)-Div. Ct.)
4.	<i>British Columbia Securities Commission v. Branch</i> , [1995] 2 S.C.R. 3
5.	<i>Covert v. Nova Scotia</i> , [1980] 2 S.C.R. 774
6.	<i>Davey v. Woolley et al.</i> (1982), 35 O.R. (2d) 599 (C.A.) (QL)
7.	<i>Montréal (City) v. 2952-1366 Québec Inc.</i> , [2005] 3 S.C.R. 141
8.	<i>Mussani v. College of Physicians and Surgeons of Ontario</i> (2004), 74 O.R. (3d) 1 (C.A.)
9.	<i>Ontario (Police Complaints Commissioner) v. Toronto (Metropolitan) Police Force</i> , (1997) 143 D.L.R. (4 th) 471 (C.A.) [Kerr Complaint]
10.	<i>Poulin v. Serge Morency et Associés Inc.</i> [1999] 3 S.C.R. 351
11.	<i>Pritchard v. Ontario (Human Rights Commission)</i> , [2004] 1 S.C.R. 809
12.	<i>Re Regina and Speid</i> (1983), 43 O.R. (2d) 596 (C.A.) (QL)
13.	<i>Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)</i> , [1990] 1 S.C.R. 1123
14.	<i>R. v. Adams</i> , [1995] 4 S.C.R. 707

15.	<i>R. v. Barrett</i> , (1993) 82 C.C.C. (3d) 266 (C.A.); [1995] 1 S.C.R. 752
16.	<i>R. v. Bowerbank</i> , [2001] O.J. No. 755 (S.C.J.)
17.	<i>R. v. Drury</i> , (2000) 150 Man. R. (2d) 64 (C.A.); [2000] S.C.C.A. No. 619
18.	<i>R. v. Dunbar</i> (1982), 68 C.C.C. (2d) 13 (Ont. C.A.)
19.	<i>R. v. Fisher</i> , (2008) 78 W.C.B. (2d) 68 (Ont. S.C.J.)
20.	<i>R. v. Fitzpatrick</i> , [1995] 4 S.C.R. 154
21.	<i>R. v. Flores</i> , [1994] O.J. No. 3124 (O.C.J. (Prov. Div.))
22.	<i>R. v. Grant</i> , [2009] 2 S.C.R. 353
23.	<i>R. v. Green</i> , [1998] O.J. No. 3598 (O.C.J. (Gen. Div.))
24.	<i>R. v. Mattis</i> , (1998) 20 C.R. (5 th) 932 (O.C.J. (Prov. Div.))
25.	<i>R. v. McCallen</i> , (1999) 43 O.R. (3d) 56 (C.A.)
26.	<i>R. v. McKennon</i> , [2004] O.J. No. 5021 (S.C.J.)
27.	<i>R. v. Schertzer</i> , (2007) 161 C.R.R. (2d) 367 (Ont. S.C.J.); (2009) 248 C.C.C. (3d) 270 (C.A.)
28.	<i>R. v. Suberu</i> , [2009] 2 S.C.R. 460
29.	<i>R. v. Williams</i> , (2001) 208 Sask. R. 79 (Q.B.)
30.	<i>Rizzo & Rizzo Shoes Ltd. (Re)</i> , [1998] 1 S.C.R. 27
31.	<i>Spellacy v. Newfoundland</i> , (1991) 28 A.C.W.S. (3d) 548 (Nfld. S.C.) (QL)
Secondary Materials	
32.	Hon. George W. Adams, Q.C., <i>Consultation Report of the Honourable George W. Adams, Q.C. to the Attorney General and the Solicitor General Concerning Police Cooperation with the Special Investigations Unit</i> (May 14, 1998)

33.	Hon. George W. Adams, Q.C., <i>Review Report on the Special Investigations Unit Reforms prepared for the Attorney General of Ontario</i> (February 26, 2003)
34.	Peter W. Hogg, <i>Constitutional Law of Canada</i> , 5th ed., looseleaf (Toronto: Carswell, 2007)
35.	Law Society of Upper Canada, <i>Rules of Professional Conduct</i> (February, 2010)
36.	Law Society of Upper Canada, <i>Professional Regulation Committee Report to Convocation</i> (November 8, 2001)
37.	Ombudsman of Ontario, <i>Oversight Unseen: Investigation into the Special Investigation Unit's operational effectiveness and credibility</i> (September 2008)
38.	Hon. Roger Salhany, Q.C., <i>Report of the Taman Inquiry</i> (Library and Archives Canada, 2008)
39.	Ruth Sullivan, <i>Sullivan on the Construction of Statutes</i> , 5th ed. (Markham, ON: LexisNexis, 2008)

SCHEDULE “B”

1. *Police Services Act*, R.S.O. 1990, c.P.15
2. Ontario Regulation 673/98, *Conduct & Duties of Police Officers Respecting Investigations by the SIU*
3. Ontario Regulation 123/98, Sched. *Code of Conduct*, s.2(1)(c)
4. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11
5. *Legislation Act, 2006*, R.S.O. 2006, c.21, Sch. F

Police Services Act

R.S.O. 1990, CHAPTER P.15

...

Duties of police officer

[42. \(1\)](#) The duties of a police officer include,

- (a) preserving the peace;
- (b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;
- (c) assisting victims of crime;
- (d) apprehending criminals and other offenders and others who may lawfully be taken into custody;
- (e) laying charges and participating in prosecutions;
- (f) executing warrants that are to be executed by police officers and performing related duties;
- (g) performing the lawful duties that the chief of police assigns;
- (h) in the case of a municipal police force and in the case of an agreement under section 10 (agreement for provision of police services by O.P.P.), enforcing municipal by-laws;
- (i) completing the prescribed training. R.S.O. 1990, c. P.15, s. 42 (1); 1997, c. 8, s. 28.

Power to act throughout Ontario

[\(2\)](#) A police officer has authority to act as such throughout Ontario.

Powers and duties of common law constable

[\(3\)](#) A police officer has the powers and duties ascribed to a constable at common law. R.S.O. 1990, c. P.15, s. 42 (2, 3).

...

Withdrawal of Public Complaints

Withdrawing a public complaint

[74. \(1\)](#) A complainant who has made a complaint under subsection 58 (1) may withdraw his or her complaint on notice to the Independent Police Review

Director, unless a hearing in respect of the complaint has commenced. 2007, c. 5, s. 10.

Notice

(2) If a complaint is withdrawn under subsection (1), the Independent Police Review Director shall promptly give notice of the fact of the withdrawal to,

(a) the chief of police of the police force to which the complaint relates, in the case of a complaint about a policy of or service provided by the police force, or about the conduct of a police officer other than a chief of police or deputy chief of police;

(b) the board, in the case of a complaint about the conduct of a municipal chief of police or municipal deputy chief of police; or

(c) the Solicitor General, in the case of a complaint about the conduct of the Commissioner or a deputy Commissioner. 2007, c. 5, s. 10.

Same

(3) Subject to subsections (4), (5) and (6), if a chief of police or board is notified under subsection (2) of the withdrawal of a complaint about the conduct of a police officer, the chief of police or board, as the case may be, shall, within 30 days after receiving the notice of withdrawal from the Independent Police Review Director, notify the police officer who is the subject of the complaint of the fact. 2007, c. 5, s. 10.

Complaint may be continued

(4) The chief of police or board may continue to deal with a complaint after the complaint is withdrawn under subsection (1) if the chief of police or board, as the case may be, determines within 30 days of receiving the notice of withdrawal that it is appropriate to do so. 2007, c. 5, s. 10.

Same

(5) In the case of a complaint about the conduct of a police officer, a complaint continued under subsection (4) shall be dealt with as if it had been made by the chief of police under subsection 76 (1) or by the board under subsection 77 (1), as the case may be. 2007, c. 5, s. 10.

Notice

(6) If the chief of police or board continues to deal with a complaint about the conduct of a police officer after it is withdrawn, the chief of police or board, as the case may be, shall, within 30 days after receiving the notice of withdrawal, notify the police officer who is the subject of the complaint of the withdrawal and the continuance of the complaint unless, in the chief of police's or board's opinion, to do so might prejudice an investigation into the matter. 2007, c. 5, s. 10.

Withdrawal during hearing

75. (1) Despite subsection 74 (1), a complainant may withdraw his or her complaint after a hearing in respect of the complaint has commenced, if the following persons consent to the withdrawal:

1. The Independent Police Review Director.
2. The chief of police, in the case of a complaint about the conduct of a police officer other than a chief of police or deputy chief of police.
3. The board, in the case of a complaint about the conduct of a municipal chief of police or municipal deputy chief of police. 2007, c. 5, s. 10.

Same

(2) Subsections 74 (2) to (6) do not apply to a complaint withdrawn in accordance with subsection (1). 2007, c. 5, s. 10.

Internal Complaints

Complaints by chief

76. (1) A chief of police may make a complaint under this section about the conduct of a police officer on his or her police force, other than the deputy chief of police, and shall cause the complaint to be investigated and the investigation to be reported on in a written report. 2007, c. 5, s. 10.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (1) is amended by striking out “on his or her police force” and substituting “employed by his or her police force”. See: 2009, c. 30, ss. 57, 63.

Same

(2) A chief of police who makes a complaint under subsection (1) is not a complainant for the purposes of this Part. 2007, c. 5, s. 10.

Notice

(3) Upon making a complaint about the conduct of a police officer, the chief of police shall promptly give notice of the substance of the complaint to the police officer unless, in the chief of police’s opinion, to do so might prejudice an investigation into the matter. 2007, c. 5, s. 10.

Investigation assigned to another police force

(4) A municipal chief of police may, with the approval of the board and on written notice to the Commission, ask the chief of police of another police force to cause the complaint to be investigated and to report, in writing, back to him or her at the expense of the police force to which the complaint relates. 2007, c. 5, s. 10.

Same, re O.P.P. officer

[\(5\)](#) In the case of a complaint about the conduct of a police officer who is a member of the Ontario Provincial Police, the Commissioner may, on written notice to the Commission, ask the chief of police of another police force to cause the complaint to be investigated and to report, in writing, back to him or her at the expense of the Ontario Provincial Police. 2007, c. 5, s. 10.

Same, more than one force involved

[\(6\)](#) If the complaint is about an incident that involved the conduct of two or more police officers who are members of different police forces, the chiefs of police whose police officers are the subjects of the complaint shall agree on which police force, which may be one of the police forces whose police officer is a subject of the complaint or another police force, is to investigate the complaint and report, in writing, back to the other chief or chiefs of police and how the cost of the investigation is to be shared. 2007, c. 5, s. 10.

Same

[\(7\)](#) If the chiefs of police cannot agree under subsection (6), the Commission shall decide how the cost of the investigation is to be shared and,

(a) shall decide which of the chiefs of police whose police officer is a subject of the complaint shall cause the complaint to be investigated and report in writing back to the other chief or chiefs of police; or

(b) shall ask another chief of police to cause the complaint to be investigated and to report back in writing to the chiefs of police. 2007, c. 5, s. 10.

Unsubstantiated complaint

[\(8\)](#) If at the conclusion of the investigation and on review of the written report submitted to him or her the chief of police is of the opinion that the complaint is unsubstantiated, the chief of police shall take no action in response to the complaint and shall notify the police officer who is the subject of the complaint in writing of the decision, together with a copy of the written report. 2007, c. 5, s. 10.

Hearing to be held

[\(9\)](#) Subject to subsection (10), if at the conclusion of the investigation and on review of the written report submitted to him or her the chief of police believes on reasonable grounds that the police officer's conduct constitutes misconduct as defined in section 80 or unsatisfactory work performance, he or she shall hold a hearing into the matter. 2007, c. 5, s. 10.

Informal resolution

[\(10\)](#) If at the conclusion of the investigation and on review of the written report submitted to him or her the chief of police is of the opinion that there was misconduct or unsatisfactory work performance but that it was not of a serious nature, the chief of police may resolve the matter informally without holding a

hearing, if the police officer consents to the proposed resolution. 2007, c. 5, s. 10.

Consent of police officer

[\(11\)](#) A police officer who consents to a proposed resolution under subsection (10) may revoke the consent by notifying the chief of police in writing of the revocation no later than 12 business days after the day on which the consent is given. 2007, c. 5, s. 10.

Disposition without a hearing

[\(12\)](#) If an informal resolution of the matter is attempted but not achieved, the following rules apply:

1. The chief of police shall provide the police officer with reasonable information concerning the matter and shall give him or her an opportunity to reply, orally or in writing.
2. Subject to paragraph 3, the chief of police may impose on the police officer a penalty described in clause 85 (1) (d), (e) or (f) or any combination thereof and may take any other action described in subsection 85 (7) and may cause an entry concerning the matter, the penalty imposed or action taken and the police officer's reply to be made in his or her employment record.
3. If the police officer refuses to accept the penalty imposed or action taken, the chief of police shall not impose a penalty or take any other action or cause any entry to be made in the police officer's employment record, but shall hold a hearing under subsection (9). 2007, c. 5, s. 10.

Employment record expunged

[\(13\)](#) An entry made in the police officer's employment record under paragraph 2 of subsection (12) shall be expunged from the record two years after being made if during that time no other entries concerning misconduct or unsatisfactory work performance have been made in the record under this Part. 2007, c. 5, s. 10.

Agreement

[\(14\)](#) Nothing in this section affects agreements between boards and police officers or associations that permit penalties or actions other than those permitted by this section, if the police officer in question consents, without a hearing under subsection (9). 2007, c. 5, s. 10.

Complaints by board

[77. \(1\)](#) A board may make a complaint under this section about the conduct of the municipal chief of police or municipal deputy chief of police and shall review such complaint. 2007, c. 5, s. 10.

Same

(2) A board that makes a complaint under subsection (1) is not a complainant for the purposes of this Part. 2007, c. 5, s. 10.

Notice

(3) Upon making a complaint about the conduct of a chief of police or deputy chief of police, the board shall promptly give notice of the substance of the complaint to the chief of police or deputy chief of police unless, in the board's opinion, to do so might prejudice an investigation into the matter. 2007, c. 5, s. 10.

Investigation assigned to another police force

(4) If at the conclusion of the review the board is of the opinion that the chief of police's or deputy chief of police's conduct may constitute an offence under a law of Canada or of a province or territory, or misconduct as defined in section 80 or unsatisfactory work performance, the board shall ask the Commission to assign the chief of police of another police force to cause the complaint to be investigated promptly and the investigation to be reported on in a written report at the board's expense. 2007, c. 5, s. 10.

Unsubstantiated complaint

(5) If at the conclusion of the investigation conducted by another police force the chief of police of the other police force is of the opinion that the complaint is unsubstantiated, the chief of police shall report that opinion in writing to the board and the board shall take no action in response to the complaint and shall notify the chief of police or deputy chief of police who is the subject of the complaint in writing of the decision, together with a copy of the written report. 2007, c. 5, s. 10.

Matter referred to board

(6) If at the conclusion of the investigation conducted by another police force the chief of police of the other police force believes on reasonable grounds that the conduct of the chief of police or deputy chief of police under investigation constitutes misconduct or unsatisfactory work performance, he or she shall refer the matter, together with the written report, to the board. 2007, c. 5, s. 10.

Board or Commission to hold hearing

(7) Subject to subsection (8), the board shall hold a hearing into a matter referred to it under subsection (6) or may refer the matter to the Commission to hold the hearing. 2007, c. 5, s. 10.

Informal resolution

(8) If on a review of the written report the board is of the opinion that there was misconduct or unsatisfactory work performance but that it was not of a serious nature, the board may resolve the matter informally without holding a hearing if the chief of police or deputy chief of police consents to the proposed resolution. 2007, c. 5, s. 10.

Disposition without a hearing

[\(9\)](#) If an informal resolution of the matter is attempted but not achieved, the following rules apply:

1. The board shall provide the chief of police or deputy chief of police with reasonable information concerning the matter and shall give him or her an opportunity to reply, orally or in writing.
2. Subject to paragraph 3, the board may impose on the chief of police or deputy chief of police a penalty described in clause 85 (2) (d), (e) or (f) or any combination thereof and may take any other action described in subsection 85 (7) and may cause an entry concerning the matter, the penalty imposed or action taken and the chief of police's or deputy chief of police's reply to be made in his or her employment record.
3. If the chief of police or deputy chief of police refuses to accept the penalty imposed or action taken, the board shall not impose a penalty or take any other action or cause any entry to be made in the employment record, but shall hold a hearing, or refer the matter to the Commission to hold a hearing, under subsection (7). 2007, c. 5, s. 10.

Employment record expunged

[\(10\)](#) An entry made in the chief of police's or deputy chief of police's employment record under paragraph 2 of subsection (9) shall be expunged from the record two years after being made if during that time no other entries concerning misconduct or unsatisfactory work performance have been made in the record under this Part. 2007, c. 5, s. 10.

Agreement

[\(11\)](#) Nothing in this section affects agreements between boards and chiefs of police or deputy chiefs of police that permit penalties or actions other than those permitted by this section, if the chief of police or deputy chief of police in question consents, without a hearing under subsection (7). 2007, c. 5, s. 10.

Internal complaints may be directed

[78. \(1\)](#) The Commission may, in respect of a complaint made by a chief of police under section 76 or by a board under section 77, at any stage in the complaints process direct the chief of police or board, as the case may be, to deal with the complaint as it specifies or assign the review or investigation of the complaint or the conduct of a hearing in respect of the complaint to a police force other than the police force to which the complaint relates. 2007, c. 5, s. 10.

Duty

[\(2\)](#) If the Commission directs that a complaint is to be dealt with as specified, the chief of police or board, as the case may be, shall promptly so deal with the complaint. 2007, c. 5, s. 10.

Costs

(3) If the Commission assigns the review or investigation of a complaint or the conduct of a hearing in respect of a complaint to a police force, the police force to which the complaint relates shall pay the costs of the review, investigation or hearing incurred by the police force to which the matter is assigned. 2007, c. 5, s. 10.

Offences

Offences re complaints

79. (1) No person shall harass, coerce or intimidate, or attempt to harass, coerce or intimidate, any other person in relation to a complaint that is made under this Part. 2007, c. 5, s. 10.

Same

(2) No person shall intentionally hinder or obstruct or attempt to hinder or obstruct the Independent Police Review Director or an investigator appointed by the Independent Police Review Director in the performance of his or her duties under this Act, or furnish him or her with false information. 2007, c. 5, s. 10.

Penalty

(3) A person who contravenes subsection (1) or (2) is guilty of an offence and on conviction is liable to a fine of not more than \$2,000 or to imprisonment for a term of not more than one year, or to both. 2007, c. 5, s. 10.

Consent of Attorney General required

(4) No prosecution shall be instituted under this section without the consent of the Attorney General. 2007, c. 5, s. 10.

Misconduct

80. (1) A police officer is guilty of misconduct if he or she,

(a) commits an offence described in a prescribed code of conduct;

(b) contravenes section 46 (political activity);

(c) engages in an activity that contravenes subsection 49 (1) (secondary activities) without the permission of his or her chief of police or, in the case of a municipal chief of police, without the permission of the board, being aware that the activity may contravene that subsection;

(d) contravenes subsection 55 (5) (resignation during emergency);

(e) commits an offence described in subsection 79 (1) or (2) (offences, complaints);

(f) contravenes section 81 (inducing misconduct, withholding services);

- (g) contravenes section 117 (trade union membership);
- (h) deals with personal property, other than money or a firearm, in a manner that is not consistent with section 132;
- (i) deals with money in a manner that is not consistent with section 133;
- (j) deals with a firearm in a manner that is not consistent with section 134;
- (k) contravenes a regulation made under paragraph 15 (equipment), 16 (use of force), 17 (standards of dress, police uniforms), 20 (police pursuits) or 21 (records) of subsection 135 (1). 2007, c. 5, s. 10.

Off-duty conduct

(2) A police officer shall not be found guilty of misconduct under subsection (1) if there is no connection between the conduct and either the occupational requirements for a police officer or the reputation of the police force. 2007, c. 5, s. 10.

Inducing misconduct and withholding services

Inducing misconduct

81. (1) No person shall,

- (a) induce or attempt to induce a member of a police force to withhold his or her services; or
- (b) induce or attempt to induce a police officer to commit misconduct. 2007, c. 5, s. 10.

Withholding services

(2) No member of a police force shall withhold his or her services. 2007, c. 5, s. 10.

Offence

(3) A person who contravenes subsection (1) or (2) is guilty of an offence and on conviction is liable to a fine of not more than \$2,000 or to imprisonment for a term of not more than one year, or to both. 2007, c. 5, s. 10.

Consent of Solicitor General

(4) No prosecution shall be instituted under this section without the consent of the Solicitor General. 2007, c. 5, s. 10.

Hearings

Prosecutor at hearing

82. (1) The chief of police shall designate to be the prosecutor at a hearing held under subsection 66 (3), 68 (5) or 76 (9),

(a) a police officer from any police force of a rank equal to or higher than that of the police officer who is the subject of the hearing; or

(b) a person authorized under the *Law Society Act* to be a prosecutor at the hearing. 2007, c. 5, ss. 10, 13 (4).

Same

(2) A police officer from another police force may be the prosecutor at the hearing only with the approval of his or her chief of police. 2007, c. 5, s. 10.

Same

(3) The board or Commission shall designate to be the prosecutor at a hearing held under subsection 69 (8) or 77 (7), as the case may be, a person authorized under the *Law Society Act* to be a prosecutor at the hearing, and the board shall pay the prosecutor's remuneration regardless of whether the prosecutor is designated by the board or by the Commission. 2007, c. 5, s. 13 (5).

Hearings, procedure

83. (1) A hearing held under subsection 66 (3), 68 (5), 69 (8), 76 (9) or 77 (7) shall be conducted in accordance with the *Statutory Powers Procedure Act*. 2007, c. 5, s. 10.

Application of this section

(2) Subsections (3), (4), (5), (6), (11), (12), (13), (14), (15) and (16) apply to any hearing held under this Part. 2007, c. 5, s. 10.

Parties

(3) The parties to the hearing are the prosecutor, the police officer who is the subject of the hearing and, if the complaint was made by a member of the public, the complainant. 2007, c. 5, s. 10.

Notice and right to representation

(4) The parties to the hearing shall be given reasonable notice of the hearing, and each party may be represented by a person authorized under the *Law Society Act* to represent the party. 2007, c. 5, s. 13 (6).

Examination of evidence

(5) Before the hearing, the police officer and the complainant, if any, shall each be given an opportunity to examine any physical or documentary evidence that will be produced or any report whose contents will be given in evidence. 2007, c. 5, s. 10.

Police officer not required to give evidence

(6) The police officer who is the subject of the hearing shall not be required to give evidence at the hearing. 2007, c. 5, s. 10.

Non-compellability

[\(7\)](#) No person shall be required to testify in a civil proceeding with regard to information obtained in the course of his or her duties under this Part, except at a hearing held under this Part. 2007, c. 5, s. 10.

Inadmissibility of documents

[\(8\)](#) No document prepared as the result of a complaint made under this Part is admissible in a civil proceeding, except at a hearing held under this Part. 2007, c. 5, s. 10.

Inadmissibility of statements

[\(9\)](#) No statement made during an attempt at informal resolution of a complaint under this Part is admissible in a civil proceeding, including a proceeding under subsection 66 (10), 69 (12), 76 (12) or 77 (9), or a hearing under this Part, except with the consent of the person who made the statement. 2007, c. 5, s. 10.

Recording of evidence

[\(10\)](#) The oral evidence given at the hearing shall be recorded and copies of transcripts shall be provided on the same terms as in the Superior Court of Justice. 2007, c. 5, s. 10.

Release of exhibits

[\(11\)](#) Within a reasonable time after the matter has been finally determined, documents and things put in evidence at the hearing shall, on request, be released to the person who produced them. 2007, c. 5, s. 10.

No communication without notice

[\(12\)](#) Subject to subsection (13), the person conducting the hearing shall not communicate directly or indirectly in relation to the subject matter of the hearing with any person, unless the parties receive notice and have an opportunity to participate. 2007, c. 5, ss. 10, 13 (7).

Exception

[\(13\)](#) The person conducting the hearing may seek legal advice from an advisor independent of the parties, and in that case the nature of the advice shall be communicated to them so that they may make submissions as to the law. 2007, c. 5, s. 10.

If Crown Attorney consulted

[\(14\)](#) If a Crown Attorney has been consulted, the person conducting the hearing may proceed to deal with the part of the complaint that, in his or her opinion, constitutes misconduct as defined in section 80 or unsatisfactory work performance, unless the Crown Attorney directs otherwise. 2007, c. 5, s. 10.

Hearing to continue

[\(15\)](#) If the police officer who is the subject of the hearing is charged with an offence under a law of Canada or of a province or territory in connection with the conduct that was the subject of the complaint, the hearing shall continue unless the Crown Attorney advises the chief of police or board, as the case may be, that it should be stayed until the conclusion of the proceedings dealing with the offence. 2007, c. 5, s. 10.

Photography at hearing

[\(16\)](#) Subsections 136 (1), (2) and (3) of the *Courts of Justice Act* (photography at court hearing) apply with necessary modifications to the hearing and a person who contravenes subsection 136 (1), (2) or (3) of the *Courts of Justice Act*, as it is made to apply by this subsection, is guilty of an offence and on conviction is liable to a fine of not more than \$2,000. 2007, c. 5, s. 10.

Six-month limitation period, exception

[\(17\)](#) If six months have elapsed since the day described in subsection (18), no notice of hearing shall be served unless the board, in the case of a municipal police officer, or the Commissioner, in the case of a member of the Ontario Provincial Police, is of the opinion that it was reasonable, under the circumstances, to delay serving the notice of hearing. 2007, c. 5, s. 10.

Same

[\(18\)](#) The day referred to in subsection (17) is,

(a) in the case of a hearing in respect of a complaint made under this Part by a member of the public about the conduct of a police officer other than a chief of police or deputy chief of police,

(i) the day on which the chief of police received the complaint referred to him or her by the Independent Police Review Director under clause 61 (5) (a) or (b), or

(ii) the day on which the complaint was retained by the Independent Police Review Director under clause 61 (5) (c);

(b) in the case of a hearing in respect of a complaint made under this Part by a member of the public about the conduct of a chief of police or deputy chief of police, the day on which the board received the complaint referred to it by the Independent Police Review Director under subsection 61 (8); or

(c) in the case of a hearing in respect of a complaint made under this Part by a chief of police or board, the day on which the facts on which the complaint is based first came to the attention of the chief of police or board, as the case may be. 2007, c. 5, s. 10.

Findings and disposition

[84. \(1\)](#) If at the conclusion of a hearing under subsection 66 (3), 68 (5) or 76 (9) held by the chief of police, misconduct as defined in section 80 or unsatisfactory

work performance is proved on clear and convincing evidence, the chief of police shall take any action described in section 85. 2007, c. 5, s. 10.

Same

(2) If at the conclusion of a hearing under subsection 69 (8) or 77 (7) held by the board, misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and convincing evidence, the board shall take any action described in section 85. 2007, c. 5, s. 10.

Same

(3) If at the conclusion of a hearing under subsection 69 (8) or 77 (7) held by the Commission, misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and convincing evidence, the Commission shall, subject to subsection (4), direct the board in writing to take such action described in section 85 as the Commission specifies. 2007, c. 5, s. 10.

Notice needed

(4) The Commission shall not direct the board to impose the penalties of dismissal or demotion unless the notice of hearing or a subsequent notice served on the chief of police or deputy chief of police indicated that they might be imposed if the complaint were proved on clear and convincing evidence. 2007, c. 5, s. 10.

Powers at conclusion of hearing by chief of police, board or Commission

85. (1) Subject to subsection (4), the chief of police may, under subsection 84 (1),

- (a) dismiss the police officer from the police force;
- (b) direct that the police officer be dismissed in seven days unless he or she resigns before that time;
- (c) demote the police officer, specifying the manner and period of the demotion;
- (d) suspend the police officer without pay for a period not exceeding 30 days or 240 hours, as the case may be;
- (e) direct that the police officer forfeit not more than three days or 24 hours pay, as the case may be;
- (f) direct that the police officer forfeit not more than 20 days or 160 hours off, as the case may be; or
- (g) impose on the police officer any combination of penalties described in clauses (c), (d), (e) and (f). 2007, c. 5, s. 10.

Same

(2) Subject to subsection (4), the board may, under subsection 84 (2),

- (a) dismiss the chief of police or deputy chief of police from the police force;
- (b) direct that the chief of police or deputy chief of police be dismissed in seven days unless he or she resigns before that time;
- (c) demote the chief of police or deputy chief of police, specifying the manner and period of the demotion;
- (d) suspend the chief of police or deputy chief of police without pay for a period not exceeding 30 days or 240 hours, as the case may be;
- (e) direct that the chief of police or deputy chief of police forfeit not more than three days or 24 hours pay, as the case may be;
- (f) direct that the chief of police or deputy chief of police forfeit not more than 20 days or 160 hours off, as the case may be;
- (g) impose on the chief of police or deputy chief of police any combination of penalties described in clauses (c), (d), (e) and (f). 2007, c. 5, s. 10.

Same

(3) The board shall promptly take any action that the Commission directs it to take under subsection 84 (3). 2007, c. 5, s. 10.

Notice needed

(4) The chief of police or board, as the case may be, shall not impose the penalties of dismissal or demotion under subsection (1) or (2) unless the notice of hearing or a subsequent notice served on the chief of police, deputy chief of police or other police officer indicated that they might be imposed if the complaint were proved on clear and convincing evidence. 2007, c. 5, s. 10.

Calculation of penalties

(5) Penalties imposed under clauses (1) (d), (e) and (f) and (2) (d), (e) and (f) shall be calculated in terms of days if the chief of police, deputy chief of police or other police officer normally works eight hours a day or less and in terms of hours if he or she normally works more than eight hours a day. 2007, c. 5, s. 10.

Same

(6) If a penalty is imposed under clause (1) (e) or (2) (e), the chief of police, deputy chief of police or other police officer, as the case may be, may elect to satisfy the penalty by working without pay or by applying the penalty to his or her vacation or overtime credits or entitlements. 2007, c. 5, s. 10.

Additional powers

(7) In addition to or instead of a penalty described in subsection (1) or (2), the chief of police or board, as the case may be, may under subsection 84 (1) or (2),

- (a) reprimand the chief of police, deputy chief of police or other police officer;
- (b) direct that the chief of police, deputy chief of police or other police officer undergo specified counselling, treatment or training;
- (c) direct that the chief of police, deputy chief of police or other police officer participate in a specified program or activity;
- (d) take any combination of actions described in clauses (a), (b) and (c). 2007, c. 5, s. 10.

Notice of decision

(8) The chief of police or board, as the case may be, shall promptly give written notice of any penalty imposed or action taken under subsection (1), (2), (3) or (7), with reasons,

- (a) to the chief of police, deputy chief of police or other police officer who is the subject of the complaint;
- (b) in the case of a penalty imposed or action taken by a municipal chief of police, to the board; and
- (c) in the case of a penalty imposed or action taken in respect of a complaint made by a member of the public, to the complainant. 2007, c. 5, s. 10.

Employment record

(9) The chief of police or board, as the case may be, may cause an entry concerning the matter, the action taken and the reply of the chief of police, deputy chief of police or other police officer against whom the action is taken, to be made in his or her employment record, but no reference to the allegations of the complaint or the hearing shall be made in the employment record, and the matter shall not be taken into account for any purpose relating to his or her employment unless,

- (a) misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and convincing evidence; or
- (b) the chief of police, deputy chief of police or other police officer resigns before the matter is finally disposed of. 2007, c. 5, s. 10.

Restriction on employment

(10) No person who is dismissed under section 84, or who resigns following a direction under section 84, may be employed as a member of a police force

unless five years have passed since the dismissal or resignation. 2007, c. 5, s. 10; 2009, c. 33, Sched. 2, s. 60 (2).

...

PART VII SPECIAL INVESTIGATIONS

Special investigations unit

113. (1) There shall be a special investigations unit of the Ministry of the Solicitor General. R.S.O. 1990, c. P.15, s. 113 (1).

Composition

(2) The unit shall consist of a director appointed by the Lieutenant Governor in Council on the recommendation of the Solicitor General and investigators appointed under Part III of the *Public Service of Ontario Act, 2006*. R.S.O. 1990, c. P.15, s. 113 (2); 2006, c. 35, Sched. C, s. 111 (4).

Idem

(3) A person who is a police officer or former police officer shall not be appointed as director, and persons who are police officers shall not be appointed as investigators. R.S.O. 1990, c. P.15, s. 113 (3).

Acting director

(3.1) The director may designate a person, other than a police officer or former police officer, as acting director to exercise the powers and perform the duties of the director if the director is absent or unable to act. 2009, c. 33, Sched. 2, s. 60 (3).

Peace officers

(4) The director, acting director and investigators are peace officers. R.S.O. 1990, c. P.15, s. 113 (4); 2009, c. 33, Sched. 2, s. 60 (4).

Investigations

(5) The director may, on his or her own initiative, and shall, at the request of the Solicitor General or Attorney General, cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers. R.S.O. 1990, c. P.15, s. 113 (5).

Restriction

(6) An investigator shall not participate in an investigation that relates to members of a police force of which he or she was a member. R.S.O. 1990, c. P.15, s. 113 (6).

Charges

(7) If there are reasonable grounds to do so in his or her opinion, the director shall cause informations to be laid against police officers in connection with the matters investigated and shall refer them to the Crown Attorney for prosecution. R.S.O. 1990, c. P.15, s. 113 (7).

Report

[\(8\)](#) The director shall report the results of investigations to the Attorney General. R.S.O. 1990, c. P.15, s. 113 (8).

Co-operation of police forces

[\(9\)](#) Members of police forces shall co-operate fully with the members of the unit in the conduct of investigations. R.S.O. 1990, c. P.15, s. 113 (9).

Note: On a day to be named by proclamation of the Lieutenant Governor, section 113 is amended by adding the following subsection:

Co-operation of appointing officials

[\(10\)](#) Appointing officials shall co-operate fully with the members of the unit in the conduct of investigations. 2009, c. 30, s. 60.

See: 2009, c. 30, ss. 60, 63.

Police Services Act

ONTARIO REGULATION 673/98

CONDUCT AND DUTIES OF POLICE OFFICERS RESPECTING INVESTIGATIONS BY THE SPECIAL INVESTIGATIONS UNIT

1. (1) In this Regulation, “SIU” means the special investigations unit established under section 113 of the Act;

“subject officer” means a police officer whose conduct appears, in the opinion of the SIU director, to have caused the death or serious injury under investigation; “witness officer” means a police officer who, in the opinion of the SIU director, is involved in the incident under investigation but is not a subject officer. O. Reg. 673/98, s. 1 (1).

(2) The SIU director may designate an SIU investigator to act in his or her place and to have all the powers and duties of the SIU director under this Regulation and, if the SIU director appoints a designate, any reference to the SIU director in this Regulation, excluding this subsection, means the SIU director or his or her designate. O. Reg. 673/98, s. 1 (2).

2. (1) The chief of police may designate a member of the police force who is not a subject officer or witness officer in the incident to act in the place of the chief of police and to have all the powers and duties of the chief of police in any matter respecting an incident under investigation by the SIU. O. Reg. 673/98, s. 2 (1).

(2) If the chief of police appoints a designate under subsection (1), any reference to the chief of police in this Regulation, excluding this section, means the chief of police or his or her designate. O. Reg. 673/98, s. 2 (2).

(3) The person appointed under subsection (1) must be a senior officer. O. Reg. 673/98, s. 2 (3).

3. A chief of police shall notify the SIU immediately of an incident involving one or more of his or her police officers that may reasonably be considered to fall within the investigative mandate of the SIU, as set out in subsection 113 (5) of the Act. O. Reg. 673/98, s. 3.

4. The chief of police shall ensure that, pending the SIU taking charge of the scene of the incident, the scene is secured by the police force in a manner consistent with all standing orders, policies and usual practice of the police force for serious incidents. O. Reg. 673/98, s. 4.

5. The SIU shall be the lead investigator, and shall have priority over any police force, in the investigation of the incident. O. Reg. 673/98, s. 5.

6. (1) The chief of police shall, to the extent that it is practicable, segregate all the police officers involved in the incident from each other until after the SIU has completed its interviews. O. Reg. 673/98, s. 6 (1).

(2) A police officer involved in the incident shall not communicate with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews. O. Reg. 673/98, s. 6 (2).

7. (1) Subject to subsection (2), every police officer is entitled to consult with legal counsel or a representative of the association and to have legal counsel or a representative of the association present during his or her interview with the SIU. O. Reg. 673/98, s. 7 (1).

(2) Subsection (1) does not apply if, in the opinion of the SIU director, waiting for legal counsel or a representative of the association would cause an unreasonable delay in the investigation. O. Reg. 673/98, s. 7 (2).

8. (1) Subject to subsections (2) and (5) and section 10, immediately upon being requested to be interviewed by the SIU, and no later than 24 hours after the request where there are appropriate grounds for delay, a witness officer shall meet with the SIU and answer all its questions. O. Reg. 673/98, s. 8 (1).

(2) A request to be interviewed must be made in person. O. Reg. 673/98, s. 8 (2).

(3) The SIU shall cause the interview to be recorded and shall give a copy of the record to the witness officer as soon as it is available. O. Reg. 673/98, s. 8 (3).

(4) The interview shall not be recorded by audiotape or videotape except with the consent of the witness officer. O. Reg. 673/98, s. 8 (4).

(5) The SIU director may request an interview take place beyond the time requirement as set out in subsection (1). O. Reg. 673/98, s. 8 (5).

9. (1) A witness officer shall complete in full the notes on the incident in accordance with his or her duty and, subject to subsection (4) and section 10, shall provide the notes to the chief of police within 24 hours after a request for the notes is made by the SIU. O. Reg. 673/98, s. 9 (1).

(2) Subject to subsection (4) and section 10, the chief of police shall provide copies of a witness officer's notes to the SIU upon request, and no later than 24 hours after the request. O. Reg. 673/98, s. 9 (2).

(3) A subject officer shall complete in full the notes on the incident in accordance with his or her duty, but no member of the police force shall provide copies of the notes at the request of the SIU. O. Reg. 673/98, s. 9 (3).

(4) The SIU director may allow the chief of police to provide copies of the notes beyond the time requirement set out in subsection (2). O. Reg. 673/98, s. 9 (4).

10. (1) The SIU shall, before requesting an interview with a police officer or before requesting a copy of his or her notes on the incident, advise the chief of police and the officer in writing whether the officer is considered to be a subject officer or a witness officer. O. Reg. 673/98, s. 10 (1).

(2) The SIU shall advise the chief of police and the police officer in writing if, at any time after first advising them that the officer is considered to be a subject officer or a witness officer, the SIU director decides that an officer formerly considered to be a subject officer is now considered to be a witness officer or an officer formerly considered to be a witness officer is now considered to be a subject officer. O. Reg. 673/98, s. 10 (2).

(3) If, after interviewing a police officer who was considered to be a witness officer when the interview was requested or after obtaining a copy of the notes of a police officer who was considered to be a witness officer when the notes were requested, the SIU director decides that the police officer is a subject officer, the SIU shall,

(a) advise the chief of police and the officer in writing that the officer is now considered to be a subject officer;

(b) give the police officer the original and all copies of the record of the interview; and

(c) give the chief of police the original and all copies of the police officer's notes. O. Reg. 673/98, s. 10 (3).

(4) The chief of police shall keep the original and all copies of the police officer's notes returned under clause (3) (c) for use in his or her investigation under section 11. O. Reg. 673/98, s. 10 (4).

11. (1) The chief of police shall also cause an investigation to be conducted forthwith into any incident with respect to which the SIU has been notified, subject to the SIU's lead role in investigating the incident. O. Reg. 673/98, s. 11 (1).

(2) The purpose of the chief of police's investigation is to review the policies of or services provided by the police force and the conduct of its police officers. O. Reg. 673/98, s. 11 (2).

(3) All members of the police force shall co-operate fully with the chief of police's investigation. O. Reg. 673/98, s. 11 (3).

(4) The chief of police of a municipal police force shall report his or her findings and any action taken or recommended to be taken to the board within 30 days after the SIU director advises the chief of police that he or she has reported the results of the SIU's investigation to the Attorney General, and the board may make the chief of police's report available to the public. O. Reg. 673/98, s. 11 (4).

(5) The Commissioner of the Ontario Provincial Police shall prepare a report of his or her findings and any action taken within 30 days after the SIU director advises the Commissioner that he or she has reported the results of the SIU's investigation to the Attorney General, and the Commissioner may make the report available to the public. O. Reg. 673/98, s. 11 (5).

12. (1) The police force may disclose to any person the fact that the SIU director has been notified of an incident and is conducting an investigation into it. O. Reg. 673/98, s. 12 (1).

(2) Except as permitted by this Regulation, the police force and members of the police force shall not, during the course of an investigation by the SIU, disclose to any person any information with respect to the incident or the investigation. O. Reg. 673/98, s. 12 (2).

13. The SIU shall not, during the course of an investigation by the SIU, make any public statement about the investigation unless such statement is aimed at preserving the integrity of the investigation. O. Reg. 673/98, s. 13.

14. A chief of police or police officer shall not be required to comply with a provision of this Regulation if, in the opinion of the SIU director, compliance is not possible for reasons beyond the chief of police's or police officer's control. O. Reg. 673/98, s. 14.

15. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 673/98, s. 15.

Police Services Act
ONTARIO REGULATION 123/98
GENERAL

...

PART V
CODE OF CONDUCT

14. (1) Any conduct described in the code of conduct, set out in the Schedule, constitutes misconduct for the purpose of section 74 of the Act. O. Reg. 123/98, s. 14 (1).

(2) The code of conduct applies to municipal police forces and the Ontario Provincial Police. O. Reg. 123/98, s. 14 (2).

15. Omitted (revokes other Regulations). O. Reg. 123/98, s. 15.

SCHEDULE
CODE OF CONDUCT

1. In this code of conduct,

“marital status” means the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage;

“record” means any record of information, however recorded, whether in printed form, on film, by electronic means or otherwise, and includes correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof.

2. (1) Any chief of police or other police officer commits misconduct if he or she engages in,

(a) Discreditable Conduct, in that he or she,

(i) fails to treat or protect a person equally without discrimination with respect to police services because of that person’s race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap,

(ii) uses profane, abusive or insulting language that relates to a person's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap,

(iii) is guilty of oppressive or tyrannical conduct towards an inferior in rank,

(iv) uses profane, abusive or insulting language to any other member of a police force,

(v) uses profane, abusive or insulting language or is otherwise uncivil to a member of the public,

(vi) wilfully or negligently makes any false complaint or statement against any member of a police force,

(vii) assaults any other member of a police force,

(viii) withholds or suppresses a complaint or report against a member of a police force or about the policies of or services provided by the police force,

(ix) is guilty of an indictable criminal offence or a criminal offence punishable upon summary conviction,

(x) contravenes any provision of the Act or the regulations, or

(xi) acts in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the police force;

(b) Insubordination, in that he or she,

(i) is insubordinate by word, act or demeanour, or

(ii) without lawful excuse, disobeys, omits or neglects to carry out any lawful order;

(c) Neglect of Duty, in that he or she,

(i) without lawful excuse, neglects or omits promptly and diligently to perform a duty as a member of the police force,

(i.1) fails to comply with any provision of Ontario Regulation 673/98 (Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit),

(ii) fails to work in accordance with orders, or leaves an area, detachment, detail or other place of duty, without due permission or sufficient cause,

- (iii) by carelessness or neglect permits a prisoner to escape,
 - (iv) fails, when knowing where an offender is to be found, to report him or her or to make due exertions for bringing the offender to justice,
 - (v) fails to report a matter that it is his or her duty to report,
 - (vi) fails to report anything that he or she knows concerning a criminal or other charge, or fails to disclose any evidence that he or she, or any person within his or her knowledge, can give for or against any prisoner or defendant,
 - (vii) omits to make any necessary entry in a record,
 - (viii) feigns or exaggerates sickness or injury to evade duty,
 - (ix) is absent without leave from or late for any duty, without reasonable excuse, or
 - (x) is improperly dressed, dirty or untidy in person, clothing or equipment while on duty;
- (d) Deceit, in that he or she,
- (i) knowingly makes or signs a false statement in a record,
 - (ii) wilfully or negligently makes a false, misleading or inaccurate statement pertaining to official duties, or
 - (iii) without lawful excuse, destroys or mutilates a record or alters or erases an entry therein;
- (e) Breach of Confidence, in that he or she,
- (i) divulges any matter which it is his or her duty to keep secret,
 - (ii) gives notice, directly or indirectly, to any person against whom any warrant or summons has been or is about to be issued, except in the lawful execution of the warrant or service of the summons,
 - (iii) without proper authority, communicates to the media or to any unauthorized person any matter connected with the police force,
 - (iv) without proper authority, shows to any person not a member of the police force or to any unauthorized member of the force any record that is the property of the police force;
- (f) Corrupt Practice, in that he or she,

- (i) offers or takes a bribe,
 - (ii) fails to account for or to make a prompt, true return of money or property received in an official capacity,
 - (iii) directly or indirectly solicits or receives a gratuity or present without the consent of the chief of police,
 - (iv) places himself or herself under a pecuniary or other obligation to a licensee concerning the granting or refusing of whose licence a member of the police force may have to report or give evidence, or
 - (v) improperly uses his or her character and position as a member of the police force for private advantage;
- (g) Unlawful or Unnecessary Exercise of Authority, in that he or she,
- (i) without good and sufficient cause makes an unlawful or unnecessary arrest, or
 - (ii) uses any unnecessary force against a prisoner or other person contacted in the execution of duty;
- (h) Damage to Clothing or Equipment, in that he or she,
- (i) wilfully or carelessly causes loss or damage to any article of clothing or equipment, or to any record or other property of the police force, or
 - (ii) fails to report loss or damage, however caused, as soon as practicable; or
- (i) Consuming Drugs or Alcohol in a Manner Prejudicial to Duty, in that he or she,
- (i) is unfit for duty, while on duty, through consumption of drugs or alcohol,
 - (ii) is unfit for duty when he or she reports for duty, through consumption of drugs or alcohol,
 - (iii) except with the consent of a superior officer or in the discharge of duty, consumes or receives alcohol from any other person while on duty, or
 - (iv) except in the discharge of duty, demands, persuades or attempts to persuade another person to give or purchase or obtain for a member of the police force any alcohol or illegal drugs while on duty.
- (2) A police officer does not commit misconduct under subclause (1) (e) (iii) if he or she engages in the described activity in his or her capacity as an authorized representative of an association, as defined in section 2 of the Act.

(3) A police officer does not commit misconduct under subclause (1) (f) (iii) if he or she engages in the described activity in his or her capacity as an authorized representative of an association, as defined in section 2 of the Act, or of a work-related professional organization.

3. Any chief of police or other police officer also commits misconduct if he or she conspires, abets or is knowingly an accessory to any misconduct described in section 2.

Canadian Charter of Rights and Freedoms

PART I OF THE CONSTITUTION ACT, 1982

Assented to March 29th, 1982

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

...

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

...

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Legislation Act, 2006

S.O. 2006, CHAPTER 21
Schedule F

...

General Rules of Construction

...

Rule of liberal interpretation

[64. \(1\)](#) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s. 64 (1).

Same

[\(2\)](#) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act. 2006, c. 21, Sched. F, s. 64 (2).